Judgments
# of the Administrative Tribunal of the International Labour Organization:

86th Session

(November 1998-January 1999)

International Labour Office
Geneva

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The jurisdiction of the Administrative Tribunal has been recognised by the following organisations (in order of recognition):

International Labour Organization (ILO), including the International Training Centre
World Health Organization (WHO), including the Pan American Health Organization (PAHO)
International Telecommunication Union (ITU)
United Nations Educational, Scientific and Cultural Organization (UNESCO)
World Meteorological Organization (WMO)
Food and Agriculture Organization of the United Nations (FAO)
European Organization for Nuclear Research (CERN)
General Agreement on Tariffs and Trade (GATT)
International Atomic Energy Agency (IAEA)
World Intellectual Property Organization (WIPO)
European Organization for the Safety of Air Navigation (Eurocontrol)
Universal Postal Union (UPU)
European Southern Observatory (ESO)
Intergovernmental Council of Copper Exporting Countries (CIPEC)
European Free Trade Association (EFTA)
Inter-Parliamentary Union (IPU)
European Molecular Biology Laboratory (EMBL)
World Tourism Organization (WTO)
European Patent Organisation (EPO)
African Training and Research Centre in Administration for Development (CAFRAD)
Intergovernmental Organisation for International Carriage by Rail (OTIF)
International Center for the Registration of Serials (CIEPS)
International Office of Epizootics (OIE)
United Nations Industrial Development Organization (UNIDO)
International Criminal Police Organization (Interpol)
International Fund for Agricultural Development (IFAD)
International Union for the Protection of New Varieties of Plants (UPOV)
Customs Co-operation Council (CCC)
Court of Justice of the European Free Trade Association (EFTA Court)
Surveillance Authority of the European Free Trade Association (ESA)
International Service for National Agricultural Research (ISNAR)
International Organization for Migration (IOM)
International Centre for Genetic Engineering and Biotechnology (ICGEB)
Organisation for the Prohibition of Chemical Weapons (OPCW)
International Hydrographic Organization (IHO)

Energy Charter Conference (ECC)
International Federation of Red Cross and Red Crescent Societies

Organisation internationale du Travail International Labour Organization
Tribunal administratif *Administrative Tribunal*

EIGHTY-SIXTH SESSION

***In re* Baliga (No. 2)**
(Application for execution)

Judgment 1784

THE ADMINISTRATIVE TRIBUNAL,

Considering the application filed by Mr. Kalyanpur Yeshavantha Baliga on 27 February 1998 for the execution of Judgment 1342, the reply of 3 June from the World Health Organization (WHO), the complainant's rejoinder of 8 July and the Organization's surrejoinder of 12 October 1998;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS

1. This is an application for the execution of Judgment 1342, which the Tribunal delivered on 13 July 1994. The judgment ordered the World Health Organization, in 15 to pay the complainant "full compensation equivalent to the salary, allowances and any other benefits that would have been due to him under a contract from 1 October 1988" up to the date at which he reached the normal age of retirement – which was 31 October 1994 – "less any occupational earnings and indemnity" he might have received in the meantime; and 4,000 United States dollars in damages for moral injury.

2. On 13 November 1994 the Organization paid him the $4,000 in moral damages and in partial execution of the judgment. On 4 May 1995 it paid him another $204,120. That sum was equivalent to the basic salary,

including within-grade salary increments, and post adjustment and child allowances that he would have received from 1 October 1988 to 31 December 1993, less his occupational earnings during the same period. Having got from him details of his earnings up to October 1994, the Organization paid him on 6 June 1995 the balance due, which came to $28,177. On account of the lapse of time since the date of the judgment it let him have interest amounting to $133 on the $4,000 and to $5,106 on the $204,120. Lastly, in May 1996 it made over $105,492.28 by way of reimbursement of all taxes payable by him to the Government of the United States on the amounts he had received in execution of the judgment.

3. In a letter of 22 February 1995 the Director of the Division of Personnel told him that the Organization would pay him the education grant he would have received for the "1988-89 scholastic year" and "exceptionally" for 1989-90 as well, provided he supplied "copies of receipts in support" of his claim to the grant for those years.

4. Though the complainant does not dispute the reckoning, he is further claiming –

(1) payment of interest at the rate of 10 per cent a year on the amounts equivalent to salary, allowances and benefits "from the date at which each sum fell due until 25 May 1995", plus interest on the interest to be reckoned at the same rate from the same date;

(2) various pension entitlements from October 1988 to October 1994;

(3) payment of education grants for his two children up to October 1994; and

(4) the costs of the present application.

5. On the termination of his appointment on 30 September 1988 the complainant returned to his permanent residence in California. In 1990 he applied for, and was granted, payment of an early, reduced, pension by the United Nations Joint Staff Pension Fund.

The claim to interest

6. In support of his claim to interest the complainant argues that he was to receive the equivalent of the salary, allowances and benefits that would have been due to him under a contract from 1 October 1988 to 31 October 1994, he would have been paid those sums each month, and so he is entitled to interest on each sum as from the date at which it would have fallen due. He points out that the judgment said in 15 that, though he "was entitled to reinstatement for the same reasons" as those explained in Judgment 1371 (*in re* Ortiz), it was too late to order his reinstatement because he was to reach the age of retirement within a few months. In his submission the judgment amounted to a "quasi-reinstatement order" warranting the payment of interest.

7. The answer to his claim is that the Tribunal did not award him interest on the sums payable as if they were monthly payments and as they fell due, but compensation merely "equivalent" to salary and allowances. He is in fact seeking to amend the award, and that he may not do.

The claim to pension entitlements

8. The complainant seeks payment, with interest, of the Organization's contributions for him to the Pension Fund for the period from 1 October 1988 to 31 October 1994 and of "the amounts he has lost, through the WHO's failure to pay such contributions since he has been receiving his ... pension in 1990".

9. Ruling in Judgment 1219 (*in re* Manaktala No. 2) on an application for the execution of Judgment 1133, the Tribunal did not order reinstatement but awarded "damages equivalent to the amount of salary, allowances and other entitlements" that Mr. Manaktala would have received in a stated period. On an application for the execution of Judgment 1219 the Tribunal ruled, in Judgment 1338 (*in re* Manaktala No. 3), that, not having been reinstated, Mr. Manaktala had no right to further pension entitlements. Neither was Mr. Baliga reinstated. Though the Tribunal knew that he was receiving the pension from the Pension Fund, it said in Judgment 1342

under 16 that his "pension payments" were not to be set off against the amount of the award. Moreover, since it did not order any payments in respect of pension, he may not now seek them.

The claim to education grant

10. The complainant claims the payment of the education grant for a daughter born in 1970 and a son born in 1972 who were both still receiving full-time higher education up to October 1994.

11. The Organization points out that according to Staff Rule 350 education grant is payable only for expenses actually incurred and for periods in which the staff member is assigned outside the country of his recognised place of residence. But by way of exception Rule 350.3.1 allows payment of the grant for the rest of the school year on the staff member's return to that country. The complainant returned to the United States - the country of his recognised place of residence - in October 1988. The Organization's letter of 22 February 1995 - referred to in 3 above - allowed him the grant not just for 1988-89, as provided for in 350.3.1, but for 1989-90 as well on the exceptional grounds that he needed more time to settle again in the United States; but for no longer than that, and in any event only if he provided proper evidence of payment of education expenses.

12. In support of his claim to payment of the grant up to October 1994 he says that it was not by choice that he went back to the United States but because of wrongful termination of his appointment. The Organization replies that it was not a foregone conclusion that it would have kept him on at his duty station in Uganda - i.e. outside his country of residence - until October 1994.

13. In these circumstances, and according to the Staff Rules, the complainant is not entitled to any education grant over and above the offer the WHO has already made him.

14. The WHO says that in any event he has supplied no receipts to show that he incurred education expenses. He pleads difficulty in doing so in that the schools his children were attending do not keep financial records

and he asks the Tribunal to order payment of the grant on the strength of cancelled cheques.

15. Under Manual paragraph I.2.510 the Organization is empowered to require that the original bills be attached to the form that the staff member must fill up to claim the education grant. It does not have to accept evidence of the sort the complainant is offering. It will evaluate any alternative proof he may produce in the absence of the bills. Original documents must have gone astray before, and it is often possible to reconstitute them. It is up to the Organization to decide - subject to review by the Tribunal - whether the proof offered is satisfactory.

16. Since in any event the application fails on the merits, there is no need to rule on the issue of receivability.

DECISION

For the above reasons,

The application is dismissed.

In witness of this judgment, adopted on 13 November 1998, Mr. Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

MICHEL GENTOT

MELLA CARROLL

JAMES K. HUGESSEN

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

EIGHTY-SIXTH SESSION

***In re* Palma (No. 2)** **Judgment 1785**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Francesco Palma against the European Southern Observatory (ESO) on 23 February 1998, the ESO's reply of 27 April, the complainant's rejoinder of 5 June and the Observatory's surrejoinder of 10 August 1998;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Italian, served on the staff of the Observatory from 1 September 1989 to 31 August 1995. Further information about his career and facts relevant to this case are set out in Judgment 1665 of 10 July 1997 on his complaint against the European Organization for Nuclear Research (CERN) and in Judgment 1718 of 29 January 1998 on his first complaint against the ESO.

By a letter of 6 January 1995 the head of Personnel told the complainant that the Administration would be withholding his yearly step increment because his work fell short of expectations. On 13 March 1995 he appealed to the Director General, who put the matter to the Joint Advisory Appeals Board. In its report of 21 July 1995 the Board recommended upholding the decision not to grant him the step, though it found that management had not "optimally handled" the case. By a letter of 26 July 1995 the head of Administration told him that the Director General had decided not to grant the step.

In a letter of 11 February 1998 he applied to the Director General for disclosure of "any information and ... existing documentation" on the case the Appeals Board had reported on in July 1995. By a letter of 13 February 1998 the head of Administration told him on the Director General's behalf that there were no grounds for reopening the matter. That is the decision he is impugning.

B. The complainant submits that the impugned decision is unlawful. He pleads breach of the Observatory's duty under Staff Regulation R VI 1.11 to inform staff members of "the correct truth". The ESO's treatment of him was unfair, discriminatory and offended against "justice and democracy".

He seeks the quashing of the impugned decision and the order of "disclosure of information and delivery of copy of all documents" concerning his appeal of 1995. He also claims costs.

C. In its reply the Observatory contends that his complaint against the withholding of his step is devoid of merit and just a ploy to reopen his case against the ending of his employment. Both issues are time-barred. Regulation R VI 1.11, which requires the Director General to bring the Appeals Board's recommendations to the staff's attention, affords no grounds for the relief he seeks. In any event there are no relevant documents that the Board has not already seen.

D. In his rejoinder the complainant enlarges on his pleas. He finds the ESO's breach of good faith "evident". He affirms his entitlement under the Charter of the United Nations to redress for the breach of fundamental rights and to information. He presses his claims.

E. In its surrejoinder the defendant contends that the Tribunal is not competent under Article VIII of the Statute to issue the "order of discovery" he seeks. The documents he wants to see - be they "administrative" or "judicial" - are figments of his own imagination.

CONSIDERATIONS

1. The material facts of this complaint date back to the last year of the complainant's service with the European Southern Observatory. The head of Personnel informed him by a letter of 6 January 1995 that he would not be granted a yearly step increment in salary as from 1 January. He appealed, and his appeal went to the Joint Advisory Appeals Board. In its report of 21 July 1995 the Board held that "the case was not optimally handled by the ESO Management in what concerns the communication to the Appellant, specifically on the assessment of his performance". Its unanimous recommendations were to uphold the decision and "have the failures in this case properly investigated and understood and to take action to avoid their repetition in the future". By a letter of 26 July 1995, the head of Administration told the complainant on the Director General's behalf that the refusal of the increment was upheld.

2. By a letter dated 11 February 1998 the complainant asked the Observatory -

> "to disclose any information and to deliver me a copy of any existing documentation concerning the case Palma, following and in relation with the JAAB recommendation report dated July 21st, 1995, i.e. any document concerning the measures by you adopted for 'investigating, understanding and taking action'."

The last five words in inverted commas were lifted from the text of the Board's recommendations.

3. As is recounted in Judgment 1718, the complainant's contract of service with the Observatory had come to an end at 31 August 1995. In his first complaint against the Observatory he asked the Tribunal to order the Director General "to clearly and unambiguously state his *legally* presumed negative final decisions", particularly on assignment to a post and on health insurance. By Judgment 1718 the Tribunal dismissed his claim to relief for being not of a kind it might grant.

4. By a letter of 13 February 1998, and in answer to the complainant's letter of 11 February, among others, the Observatory informed him on the Director General's behalf that there was "no basis for

reopening any issues" arising out of his contract, which had ended in August 1995. That is the decision he is impugning, and the relief he claims is that the Tribunal -

> "quashes ESO decision, ordering in such a way a disclosure of information and delivery of copy of all documents concerning the case Palma, following and in relation with the ESO Joint Appeal Advisory Board (JAAB) Recommendation Report dated July 21, 1995."

He claims costs. He argues that what he wanted from the ESO was not the "reopening" of any issues arising out of his contract but "legitimate delivery of documentation relative to his case" and that the misdemeanours the Observatory was guilty of in handling his case were not just administrative but criminal.

5. The defendant replies that the complainant is seeking redress for the administrative decisions to refuse him renewal of contract and a step increment.

6. It is clearly right. Because the time limits for challenging those decisions have long since expired he may no longer do so. There are therefore no grounds in law for ordering disclosure of material about either issue and his claims must fail.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 6 November 1998, Mr. Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Registry's translation,
the French text alone
being authoritative.

EIGHTY-SIXTH SESSION

***In re* Skulikaris** **Judgment 1786**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Ioanis Skulikaris against the European Patent Organisation (EPO) on 17 December 1997 and corrected on 23 January 1998, the EPO's reply of 2 April, the complainant's rejoinder of 6 July and the Organisation's surrejoinder of 9 September 1998;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. By a communiqué of 18 September 1995 the President of the European Patent Office, the EPO's secretariat, announced a decision, taken on 8 September, to amend as from 31 December 1995 Rule 4 c) i) of circular 22. The circular sets out arrangements for the repayment of the expenses of travel on home leave. Before 1 January 1996 the sum refunded was the cost of travel by rail by the shortest standard route from the place of employment to the employee's home and back again. Since that date repayment has been based on the distance between those two places and on either a "kilometric allowance" for a return journey of less than 1,000 kilometres, or 50 per cent of the air fare in business class for a return journey of more than 1,000 kilometres.

The complainant, a Greek citizen who was born in 1954, joined the Office at Munich on 1 October 1989. He is an examiner at grade A3. On 4 December 1995 he filed an appeal against the President's decision announced on 18 September 1995. On 24 June 1997 the Appeals Committee unanimously recommended rejection. By a letter of 28 July 1997 – the impugned decision – the Director of Personnel Development told the complainant that the President of the Office rejected his appeal.

B. Citing Judgment 1000 *(in re* Clements, Patak and Rödl), the complainant submits that his complaint is receivable. He is challenging the new version of circular 22, which affects him adversely, and not an individual decision taken thereunder to refund his travel costs.

On the merits he pleads breach of equal treatment in the distinction drawn between employees in one and the same category according to the distance from duty station to home. To his mind the new system favours staff whose home is under 500 kilometres distant over others, like himself, who have to buy the cheapest airline tickets that allow no change in itinerary or date. Those who go by air are worse off because an upper limit is set on the refundable fare. In any event the EPO has failed in the whole purpose of the amendment, which was to make refund simpler.

In the complainant's submission the new rules are in breach of Articles 79 and 80 of the Service Regulations, which preclude the flat-rate repayment – equivalent to half the cost of a business-class airline ticket – that the circular brought in. Subsidiary rules such as circulars must be in line with the Service Regulations.

He seeks the quashing of the President's decision, the review or withdrawal of the new version of circular 22 and an award of damages for any financial loss.

C. In its reply the EPO submits that the complaint is irreceivable: since it challenges a general measure, not an individual decision applying it, the complainant can show no injury. He is in breach of good faith since he was repaid more in 1997 than in 1995. The Tribunal may not order the review of a circular.

In subsidiary argument the EPO submits that the complaint is devoid of merit. Citing the case law, it observes that staff have no acquired right to the amount of an allowance. Before making the amendment it consulted its General Advisory Committee, which includes staff representatives and which gave unanimous consent to the amendment. There is no discrimination: the new rules cover everyone's case and the new criterion – the distance between duty station and home – is an objective one. Only the EPO can tell whether the purpose of the change is met.

There was flat-rate repayment under the old rules: the only change is the new criterion. Staff may still opt for repayment of actual expenses provided they use the cheapest means of transport. Since few of them do so opt, the flat-rate repayment is obviously ample. In refunding the cost of travel on home leave the EPO may follow a method other than the one prescribed in Article 79 of the Service Regulations for duty travel.

D. In his rejoinder the complainant submits that the rejection of his appeal is a final individual decision and therefore challengeable. He confirms that what he is challenging is circular 22, not the repayment of his own costs of travel for home leave in 1997.

In his view the Organisation is wrong to compare the sums he was repaid in 1995 and 1997. To be objective it should have compared the sum he got in 1997 with the sum he would have got but for the change. The reason why he got more in 1997 than in 1995 was that, his children being older, their airline tickets cost more. The sole purpose of his complaint is the "consistent and equitable application of the Service Regulations". The staff representatives on the General Advisory Committee doubted that the change was in line with Article 79 and thought it detrimental to the staff. What – he asks – is objective about setting an "arbitrary limit" of 500 kilometres?

The intent of the Service Regulations is that there should be a single method of reimbursement for everyone. The Organisation was therefore in breach of "the letter and spirit" of Articles 79 and 80. The Administration poached on the province of the Administrative Council, the only body empowered to amend the Regulations.

E. In its surrejoinder the Organisation submits that the complainant is confounding "individual" and "final" decision. A staff member must appeal against an individual decision so as to get a final decision challengeable in a complaint to the Tribunal.

The complainant is mistaken, too, if he thinks that what is "equitable" must be "uniform": distance is the criterion because it affords a "verifiable empirical figure". Even before circular 22 was amended there was one method for repaying duty travel and another for repaying home leave travel. The report of the General Advisory Committee said nothing of doubts expressed by staff representatives and the Office has not encroached on the Council's authority.

CONSIDERATIONS

1. The complainant, a Greek citizen, is employed by the European Patent Organisation as an examiner at grade A3. A communiqué of 18 September 1995 announced that the President of the Office had decided to amend the procedure for repaying the costs of travel on home leave. The complainant filed an internal appeal against that decision. On 24 June 1997 the Appeals Committee unanimously recommended rejection. The President endorsed that recommendation by a decision of 28 July 1997, which the complainant is now challenging before the Tribunal.

2. What the complainant wants is explicit enough and clear from comparing repayment of travel costs before 1 January 1996 and repayment since.

3. Under Articles 60, 77, 79 and 80 of the Service Regulations staff who take home leave are entitled to repayment of the actual costs of travel from duty station to home and back. According to circular 22 of 16 January 1979 they were free to opt for payment of a lump sum, or flat rate. Before the amendment that the President made on 8 September 1995 the relevant figure for staff in categories A, B5 and B6 used to be the cost of a first-class ticket by rail and by the shortest route. Since the amendment it has been either the "kilometric allowance" allowed under the Regulations for a return journey totalling under 1,000 kilometres or else, for longer journeys, half the cost of a ticket for travel by air in business class.

4. The complainant sees in the new arrangements breach of equal treatment, of Articles 79 and 80 of the Service Regulations and of the ranking of rules. The Organisation replies that, contrary to what he makes out, his complaint is irreceivable because he is challenging the amendment of circular 22, not an individual decision applying it.

5. The Organisation is right. Citing Judgment 1000 (*in re* Clements, Patak and Rödl), the complainant argues that the decision he is objecting to affects the rights of staff and will afford grounds for individual decisions and so is directly challengeable before the Tribunal. He is misreading that judgment. All it says, in 12, is that according to consistent precedent "when impugning an individual decision that touches him directly the employee of an international organisation may challenge the lawfulness of any general or prior decision". That ruling does not allow direct challenge to a general decision of a kind that must ordinarily be given effect by individual decision. As the Tribunal said in Judgments 624 (*in re* Giroud No. 2 and Lovrecich) and 663 (*in re* Kern Nos. 2, 3, 4 and 5) and has often said since, the staff member must impugn an individual decision applying a general one and, if need be, may for that purpose challenge the lawfulness of the general one without any risk of being told that such challenge is time-barred.

6. The complainant insists that what he wants to see quashed is the amendment to circular 22, i.e. a general decision. He even goes so far as to explain that he is not challenging the individual decision of 24 June 1997 letting him take home leave and setting the amount of costs refundable according to the amended circular. So his complaint cannot but fail as irreceivable.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 6 November 1998, Mr. Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

MICHEL GENTOT MELLA CARROLL JAMES K. HUGESSEN

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-SIXTH SESSION

***In re* Gramegna** **Judgment 1787**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Marco Antonio Gramegna against the International Organization for Migration (IOM) on 30 March 1998, the IOM's reply of 5 June, the complainant's rejoinder of 17 June and the Organization's surrejoinder of 30 June 1998;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant is a Chilean who was born on 1 July 1943. He has been on the staff of the IOM since 1983. At first he was a chief of division at grade P.5 in the Department of Latin American Programmes. He was later given responsibilities at grades P.4 and P.5. At the material time he was serving at headquarters in Geneva as chief of division in the Department of Planning, Research and Evaluation at grade P.5.

The Organization carried out a comprehensive programme of reform in the second half of 1997 and replaced the complainant's department with a new one called the Department of Programme and Fundraising Support. It reformed or created posts in the Professional category and invited the staff to apply.

By a notice of vacancy, dated 26 August 1997 and numbered 23(O), the Organization put up for competition the P.5 post of chief of the Programme

Support Division. The "desirable qualifications" included an advanced university degree, preferably in political or social science or economics, and a thorough knowledge of English and French "and/or" Spanish. The notice also said that a good knowledge of another European language would be a "distinct advantage". The complainant applied for that post and for another five advertised earlier. The post of chief of Programme Support and one other were confined to internal candidates, but the other four were open to outside ones too. By a letter of 16 October 1997 the Deputy Director General told the complainant that the two internal competitions were closed, he had not been successful and the procedure for filling the other posts would take at least another month. The letter told him what his duties were to be in the meantime.

By a general bulletin of 17 October the Organization announced the appointment of Mr. William Hyde as chief of Programme Support. In a letter of 20 October to the Deputy Director General the complainant observed that he had heard of no decision to abolish his post or change his duties and he asked for explanations. In a letter of 22 October the Deputy Director General cited a general bulletin of 1 October 1997 of the Director General's issuing a new organisation chart and announcing the replacement of old posts in the Professional category with new or reformed ones.

By a letter of 24 October the Human Resources Manager informed the complainant that he had not won competition 23(O). By a memorandum of 5 November to the Director of the Department of Management and Finance he asked to have the appointment of Mr. Hyde revoked.

On 6 November the complainant went on sick leave. By a letter of 4 December that Director, whose department had since become Administrative Support, told him that the appointment stood. On 23 December 1997 he appealed against that decision to the Joint Administrative Review Board.

By a letter of 16 January 1998 the Director General informed him that he was to be chief of mission in Bangkok.

In its report of 12 February the Board recommended revoking the appointment of Mr. Hyde, resuming the process of selection and granting the complainant in compensation for moral injury a sum equivalent to the unrefunded part of the medical expenses he had incurred. By a letter of

12 March 1998 the Director of Administrative Support conveyed to him the Director General's rejection of his appeal. That is the decision he is impugning.

B. The complainant contends that Mr. Hyde did not meet all the requirements in the notice of vacancy: he has no advanced university degree and though English is his mother tongue, he has poor French and no Spanish at all. The complainant professes the required qualifications in full: a doctorate in sociology, command of English, French and Spanish, and some knowledge of Italian. In his view the appointment of Mr. Hyde shows flaws of a kind that in Judgment 1646 (*in re* Pinto) led the Tribunal to set aside like decisions on the grounds that an organisation had "neglected the cardinal rule of any process of selection: the chosen candidate must have at least the qualifications stipulated in the notice".

Though the term "desirable qualifications" confers some discretion, the Organization may not pick anyone who does not have them at all. The notice gives no mere listing of useful attainments.

The complainant submits that, though never told of the abolition of his old post, in fact he was turned out of it. A strong line of precedent was laid on the Organization in the duty of trying to find him some suitable post. It ought to have given serious thought to putting him in charge of Programme Support. Choosing someone who lacked the required qualifications was a grave breach of duty. And sending him out to Bangkok did not put things right. Besides, the impugned decision was not even explained.

The Organization's treatment of him was an affront to his dignity and professional standing. He has been on sick leave since 6 November 1997, and indeed the Organization has acknowledged his ailments as service-incurred.

He claims the quashing of Mr. Hyde's appointment as chief of Programme Support, resumption of the process of selection and awards of moral damages and of 5,000 Swiss francs in costs. He seeks disclosure of the Review Board's reports.

C. In its reply the IOM contends that the rule that the successful candidate should have the qualifications stated in the notice of vacancy applies only when they are essential. Here the qualifications were only "desirable"; so it was free to assess the candidates' experience and attainments.

It describes how on the recommendation of the competent supervisor the Director General came to prefer Mr. Hyde to the complainant. The Personnel Advisory Board was split, and the Director General, having worked with both of them for years, himself assessed them against all the requirements of the notice. There was nothing arbitrary about his choice.

The Organization says that it knew how abolishing the complainant's post would affect him but complied with its duty of doing its utmost to place him. But Mr. Hyde too was stranded, and it owed him the same duty. It did find a suitable post for the complainant as chief of its mission in Bangkok. So it discharged its obligation towards him.

Neither precedent nor the rules of procedure of the Personnel Advisory Board nor the Organization's practice required it to explain to the complainant why he had been unsuccessful.

On 21 April 1998 it sent him a copy of the Review Board's report.

In comments appended to the defendant's reply Mr. Hyde says that he has "many if not all" of the required qualifications. The appraisal of his performance shows that he is performing his duties "competently and efficiently".

D. In his rejoinder the complainant points out that according to the Review Board Mr. Hyde has neither the university degree nor the work experience nor the grasp of languages required, and candidates may be objectively compared only if the listed qualifications are treated as necessary.

Though not a specialised agency of the United Nations, the IOM abides by the standards of the common system. The qualifications set out in its notices of vacancy reflect the criteria that that system applies to the grading of posts. By appointing to the post someone who did not meet the stated requirements it ignored the standards that had warranted the grade.

The complainant doubts that the Organization did its utmost to place him properly. He presses his main claims.

E. In its surrejoinder the defendant observes that although Mr. Hyde did not have the desirable university and language qualifications, he did meet many of the conditions in the notice of vacancy. The Organization maintains that it did do its utmost to reassign the complainant. It presses its other pleas.

CONSIDERATIONS

1. The complainant has held senior posts at the International Organization for Migration (IOM) since 1983. In 1992 he became chief of division in the Department of Planning, Research and Evaluation. An overhaul of the secretariat meant abolishing, altering and creating posts and inviting the staff whom such action might affect to apply for vacancies. That is how the complainant came to apply for several of them, including the post of chief of the Programme Support Division.

2. On 16 October 1997 the Deputy Director General told him that he had not been appointed to any of the posts open to "internal recruitment". The next day he learned from a bulletin that the new chief of Programme Support was Mr. William Hyde. In a letter of 5 November 1997 to the Director of the Department of Management and Finance he asked for the quashing of that appointment and the resumption of the process of selection for the post. His claims were rejected and, though the Joint Advisory Review Board found in his favour, the Director General rejected his appeal on 12 March 1998.

3. He seeks the quashing of that final decision and an award of moral damages. He has three pleas. The first is that the Organization made mistakes of law and of fact in choosing a candidate who did not have the qualifications listed in the notice of vacancy. Secondly, it acted in breach of its duty to find him another assignment after doing away with his post, and did not even tell him of the abolition. Thirdly, it failed to state the reasons for the impugned decision.

4. The complainant's second plea cannot succeed. Although the abolition of his post did demand of the Organization efforts to place him suitably and at the right grade elsewhere, he had no right to preference for any particular post, the less so since others were in the same plight. He may

object to the Organization's failure to let him have the transfer he wanted, but such failure does not make it unlawful for the Organization to have appointed another official to the post he had applied for, provided at least that that official was qualified.

5. Nor is there any substance to his third plea, that the Organization failed to explain the impugned decision. When a decision is adverse to a staff member the competent administrative authority does have to reveal the reasons for it. But when the result of a competition is announced and, more broadly, when a choice is made between candidates the reasons for the choice need not be notified at the same time as the decision.

6. Yet in exercising its discretion the competent authority must avoid mistakes of law and fact and keep objectively to the rules it notified when announcing the vacancy. The call of 26 August 1997 for internal applicants for the post of chief of Programme Support put on the list of "desirable" qualifications an advanced university degree, preferably in political or social science or economics, at least 15 years' experience of migration, assistance to refugees, project development and technical cooperation programmes, and a "thorough knowledge" of English and French "and/or" Spanish, a "good knowledge of another European language [being] a distinct advantage".

7. The complainant is a doctor of sociology. Besides Spanish, his mother tongue, he has a sure grasp of English and French and knows some Italian. And he has years of experience in the stated areas. The Joint Advisory Review Board took the view, after looking at the applicants' records, that Mr. Hyde did not have all those qualifications and should not have won.

8. The complainant follows the Board's reasoning. He points out that Mr. Hyde has "only a first-level Bachelor of Arts degree" from the State University of California and that, although his mother tongue is English, he has but slight knowledge of French and none of Spanish or any other European language. The stated qualifications being what they were, he takes exception to the Organization's thinking it reasonable to appoint someone who has no experience of project development and not the grasp of

languages required for communicating with the Organization's regional offices.

9. The defendant's answer is that the notice described the qualifications not as "essential" or the "minimum" but merely as "desirable", an adjective intended to allow wider discretion in gauging attainments and experience. The applications were put to the Personnel Advisory Board, a body that comprises representatives of both management and staff. It was split, the staff representatives recommending the complainant and management Mr. Hyde. What swayed the Director General in exercising his discretion were the views of the supervisor-to-be and Mr. Hyde's having many of the other qualifications listed in the notice.

10. That answer is telling enough, and the precedents that the complainant is praying in aid – Judgments 1158 (*in re* Vianney), 1331 (*in re* Roggiero) and, not least, 1646 (*in re* Pinto) – do concern cases in which an organisation disregarded "essential" qualifications for posts. But the Review Board was right: the criteria for assessing the fitness of candidates for one and the same post must be objective and clear. The qualifications expected may be just "desirable", not requirements binding in law. But the appointing authority is not free on that account, in assessing candidates, to disregard the fact that some do qualify and to plump for the very one who does not, even one who in other respects has the right experience and skills. As Judgment 1595 (*in re* De Riemaeker No. 3) said in 10 -

> "... though the qualifications stated in a notice of vacancy are not absolutely binding and the Director General may still exercise some discretion, he may not so utterly discard them as to flout the rules that ensure the proper openness and objectivity of the competition."

11. Here the Organization picked someone wanting in listed qualifications which, though said to be only "desirable", were in fact essential. It thereby fell short of the standards of objectiveness and openness that must govern appointment to a senior post in an international organisation. The process of selection cannot stand, and the IOM must accordingly follow a new procedure to fill the post properly. The Organization may for the time being take steps to ensure that the unit continues to function.

12. The complainant seeks moral damages. Being unlawful, the process of selection for filling the post he had applied for caused him injury, and fair redress is an award of 2,500 Swiss francs.

13. He is entitled to costs, and the amount is set at 5,000 Swiss francs.

DECISION

For the above reasons,

1. The Director General's decision of 12 March 1998 is set aside.
2. The process of selection, advertised in notice 23(O) of 26 August 1997, for the post of chief of the Programme Support Division, is set aside.
3. The Organization shall pay the complainant 2,500 Swiss francs in damages.
4. It shall pay him 5,000 Swiss francs in costs.

In witness of this judgment, adopted on 18 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
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EIGHTY-SIXTH SESSION

In re Gramegna (No. 2) — Judgment 1788

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Marco Antonio Gramegna against the International Organization for Migration (IOM) on 4 May 1998, the IOM's reply of 2 July, the complainant's rejoinder of 17 July, the Organization's surrejoinder of 7 August, the complainant's letter of 22 September to the Registrar of the Tribunal and the Registrar's letter of 23 September 1998 inviting the Organization to comment thereon, to which the Organization did not answer;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this dispute and information on the complainant's career at the IOM are to be found under A in Judgment 1787 of today's date on Mr. Gramegna's first complaint.

By a letter of 16 January 1998 the Director General told the complainant, who had been on sick leave since 6 November 1997, that he was to go from headquarters, in Geneva, to Bangkok as chief of mission at grade P.5; it was the only job free and after his sick leave he would have time to learn his new duties, as the then chief of mission would not be leaving Bangkok until the end of June.

By a letter of 22 January 1998 he asked the Director General to reconsider: other posts he had applied for were still vacant; he had an appeal pending against the appointment of Mr. William Hyde as chief of the Programme Support Division; and he was not well enough to take on the job in Bangkok. In a letter to him of 27 January the Deputy Director General upheld the decision of 16 January. In a letter of 30 January the complainant told the Deputy Director General that he would appeal and he asked for the suspension of his transfer pending a report by the Joint Administrative Review Board. He enclosed a medical certificate from his own doctor advising against his leaving Switzerland.

On 5 February he put to the Review Board his appeal against transfer. In its report of 31 March the Board recommended rejecting it. By a letter of 6 April 1998 the Director of the Administrative Support Department informed him of the recommendation and the Director General's endorsement of it. That is the decision he is challenging.

B. The complainant pleads a mistake of fact: when he was told of the transfer four of the posts he had applied for were still free and the Board had not yet reported on his appeal against the appointment of Mr. Hyde. So the Director General was wrong to say that the only job free was the one in Bangkok.

The procedure that led to the impugned decision was arbitrary. The Organization took him off his duties though it had not conveyed to him any decision to abolish his post. It made no attempt to see about reassigning staff affected by the reform of its secretariat. It simply put their posts up for competition, many of them for external competition. It thereby failed in its duty towards staff who had lost their posts. The Director General overlooked his poor health.

In disregard of precedent the Organization failed to consult him about the transfer. In taking up his appeal the Board acted in breach of his right to a hearing.

He seeks the quashing of his transfer and an award of moral damages. He claims 5,000 Swiss francs in costs.

C. In its reply the IOM challenges the complainant's version of the facts. By 16 January 1998, when he was told of his transfer, the Director General had picked candidates on the recommendation of the Personnel Advisory Board for four of the posts he had applied for.

The Organization did give priority to serving staff in filling posts after the reforms. Out of 49 posts it filled in 1997 in the Professional and Director categories it opened only five to outside applicants. It abolished the complainant's one as part of the overhaul of its secretariat. It kept the staff abreast of the reforms and their consequences. It did not ignore the state of the complainant's health: after getting the medical certificate from his own doctor it asked for a second opinion in accordance with Staff Rule 5.333. That took longer than expected, which was no doubt a pity, but it did not act arbitrarily.

It acknowledges its duty to consult a staff member when transfer may harm his private or professional interests. But the complainant's dignity and interests were never in jeopardy. It rebuts his arguments about the Board's hearing of his appeal.

D. In his rejoinder the complainant presses his pleas and his claims.

E. The Organization presses its pleas in its surrejoinder.

F. In a letter of 22 September 1998 to the Registrar the complainant says that the Director General told him on 20 August 1998 that on the strength of a second medical opinion he was cancelling the transfer to Bangkok. He presses his claims to damages and to costs.

CONSIDERATIONS

1. The IOM overhauled its secretariat in 1997. The complainant had since 1992 been on a P.5 post at its headquarters as chief of division in its Department of Planning, Research and Evaluation. It told him that that post was to go. He applied for vacancies. By a letter of 16 January 1998 the Director General told him that none of his applications had succeeded but, having looked for posts that were expected soon to become free, the Director General had found one which fully matched his qualifications, grade and experience: he was to be chief of mission in Bangkok as from the end of June.

2. Having tried in vain to get the Director General to change his mind, the complainant appealed against the decision on the grounds of poor health, among others. On 6 April 1998 he was told that on 3 April the Director General had rejected his appeal on the recommendation of the Joint Administrative Review Board.

3. That is the decision he is challenging and his complaint is receivable. He submits that poor health barred his transfer to Bangkok and that the decision was unlawful, being arbitrary and resting on mistakes of fact. It showed procedural flaws too: the IOM neither consulted him beforehand nor let him have his say.

4. By a letter of 20 August 1998 the Director General told him that the transfer was cancelled because a second medical opinion had advised against his leaving Geneva. So his claim to the quashing of the decision of 16 January 1998 shows no cause of action and the Tribunal need not entertain it. But he is also claiming moral damages and 5,000 Swiss francs in costs. The transfer having been revoked, he can show no actionable injury.

5. Having won satisfaction only after filing suit, the complainant is entitled to costs in the amount he claims: 5,000 Swiss francs.

DECISION

For the above reasons,

1. The Tribunal need not entertain the complainant's claim to the quashing of the Director General's decision of 16 January 1998.

2. The Organization shall pay him 5,000 Swiss francs in costs.

3. His other claims are dismissed.

In witness of this judgment, adopted on 18 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
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EIGHTY-SIXTH SESSION

***In re* Adorf (No. 2)** **Judgment 1789**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Hans-Martin Adorf against the European Southern Observatory (ESO) on 29 August 1997 and corrected on 8 December, the ESO's reply of 6 March 1998, the complainant's rejoinder of 18 June and the Observatory's surrejoinder of 27 July 1998;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The ESO employed the complainant as a scientific systems analyst and programmer from 1 February 1985 to 30 April 1997. On 30 October 1996 it told him of its decision not to renew his appointment after 30 April 1997 on the grounds, among others, that he had "outgrown" his post. Judgment 1738 of 9 July 1998 dismissed as irreceivable his first complaint against a decision that no appeal lay against the non-renewal.

On 23 December 1996 the Observatory published a notice announcing an external competition for his post, No. EHT702. By a letter of 30 January 1997 to Personnel Services he applied. By a letter of 11 March a personnel officer answered that, his supervisors having declared him overqualified, the ESO had put the post up for competition; so it would "not be able to consider" his application and was sending it back.

On 7 May 1997 he appealed against that decision and asked the Director General, if his case failed, to let him go straight to the Tribunal. By a letter of 2 June the head of Administration answered that the Observatory was confirming the decision of 11 March but waiving the internal appeal procedure. That is the impugned decision.

B. The complainant pleads breach of his right to have his application objectively assessed. Article R II 1.03 of the Staff Regulations says that candidates for a vacant post shall be examined by a Selection Board, and Article R II 1.22 that

> "a member of the personnel may apply for any vacant post not filled by reassignment."

The case law has it that anyone who answers the terms of a notice is entitled to have his application considered and assessed as laid down in the Staff Rules and Regulations.

The impugned decision shows abuse of authority. The reason why the ESO would not let the complainant apply was that for ulterior motives it was bent on getting rid of him. By denying him due process of selection it showed him animosity, the more so since appointing him would have served its own interests.

Its refusal to entertain his application harmed his standing by showing its resolve to do without him. It has caused him unnecessary and undue injury.

He seeks the quashing of the decision of 2 June 1997 and an award of costs.

C. In its reply the Observatory explains that according to Article R II 1.03 of the Staff Regulations selection is in stages. Some are picked at the outset on the strength of their applications; then the Selection Board rates them; and the Director General makes the appointment on its recommendations. That procedure was duly applied in this case. It helps in discarding applicants who obviously do not qualify and do not need to go even to the Board. So the complainant is wrong to read the letter of 11 March 1997 as forbidding him to apply: all it did was tell him of the outcome of the first stage of the process, at which he had been dropped.

The Observatory believes that it was right to reject him. The purpose of Article R II 1.22 of the Staff Regulations is not to privilege a serving staff member in a competition open to outside candidates. It rebuts his other pleas.

D. In his rejoinder the complainant points out that the Observatory rejected him as overqualified for his own post. So it may not properly assert the right to do so on the grounds that he was unfit for it. He was entitled to an indefinite appointment, and the defendant was in fact trying to get rid of him so as to recruit someone new more cheaply on a fixed-term appointment.

E. The Observatory maintains in its surrejoinder that he is not qualified for post EHT702. Since he was overqualified it saw no point in putting his application to the Board. Replacing him with someone cheaper was not at all its purpose.

CONSIDERATIONS

1. The salient facts of the case appeared in Judgment 1738, which ruled on Mr. Adorf's first complaint. The European Southern Observatory used to employ him as a scientific systems analyst and programmer in a division of the Observatory known as Space Telescope - European Coordinating Facility. It told him by a letter of 30 October 1996 that it would not be renewing his contract beyond 30 April 1997, the date of expiry.

2. On 23 December 1996 it announced that his post was vacant, and he applied for it on 30 January 1997. By a letter of 11 March a personnel officer informed him that for the same reason that had led the Observatory not to renew his appointment it was rejecting his application: he was "overqualified" for the job.

3. On 7 May 1997 he put a request for review to the Director General. By a letter of 2 June 1997 the head of Administration answered on the Director General's behalf upholding the decision of 11 March but giving him leave to go straight to the Tribunal without making any internal appeal.

4. On 29 August 1997 he filed this complaint seeking the quashing of the decision of 2 June. He contends that it is unlawful because it shows (1) a mistake of law, (2) abuse of authority and personal prejudice, and (3) breach of the ESO's duty to respect his dignity and reputation. The decision caused him – he says – undue and unnecessary suffering and so serious material and moral injury.

5. The complainant imputes a mistake of law to the Observatory: it forbade him to apply for a vacancy for which no-one can be better qualified or have greater experience, and so its breach of due process and equal treatment was flagrant.

6. The defendant's answer is that Article R II 1.03 of the Staff Regulations empowers it to make a first pick of the applications to go to the Selection Board and at that point strike out anyone who obviously fails to qualify. That is just what it did here and there is therefore no procedural flaw.

7. R II 1.03 reads:

> "The candidates for a vacant post, selected on the basis of their applications, shall be examined by a Selection Board, composed of representatives of the divisions concerned and of a representative of the Administration."

In his rejoinder the complainant explains that he is not pleading abuse of process or some trivial mistake of procedure but misapplication by the ESO of its own rules on competitions. Judgment 729 (*in re* Ilomechina) said:

> "the principle of equality, which is binding on an international organisation even if it is not stated in the rules, requires that when a vacancy occurred all members of the staff should have the same opportunity of securing it."

The Tribunal confirmed that precept in Judgment 1272 (*in re* Diotallevi and Tedjini), in which it held that anyone who wants a vacant post that the rules say has to be put up for competition must be allowed to do so and considered by objective criteria.

8. It appears on the evidence that the post advertised and put up for competition was indeed the complainant's old one. Although the ESO acknowledged in his appraisal report that he had performed well in that post

it rejected him on the grounds that he was overqualified. Such grounds are wrong in law. Yet they are the only ones on which the Observatory rejected the complainant, purporting to act under R II 1.03, which it says gave it discretion to reject anyone without review of the lawfulness of the reasons for doing so. It thereby denied the complainant his right to apply and to have his application properly considered. There was breach of equal treatment.

9. The Director General's decision of 2 June 1997 cannot stand. The Observatory shall pay the complainant 3,000 German marks in material and moral damages and 10,000 French francs in costs.

DECISION

For the above reasons,

1. The Director General's decision of 2 June 1997 is set aside.

2. The Observatory shall pay the complainant 3,000 German marks in material and moral damages.

3. It shall pay him 10,000 French francs in costs.

In witness of this judgment, adopted on 18 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

A.B. GARDNER

Registry's translation,
the French text alone
being authoritative.

EIGHTY-SIXTH SESSION

***In re* Adorf (No. 3)** **Judgment 1790**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr. Hans-Martin Adorf against the European Southern Observatory (ESO) on 29 August 1997 and corrected on 8 December, the ESO's reply of 6 March 1998, the complainant's rejoinder of 18 June and the Observatory's surrejoinder of 27 July 1998;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant's career at the ESO was recounted under A in Judgment 1738, which was about his first complaint.

He first took up duty at the ESO on 1 February 1985. According to Articles R II 6.13 and R IV 1.48 of the ESO's Staff Regulations as in force at the time and Annex R A 10 thereto, a staff member whose contract the Observatory has declined to renew is entitled to payment of a termination indemnity equivalent to half a month's basic salary for each unbroken year of service, up to a total of five months.

On 30 October 1996 the head of Personnel wrote to tell him that his contract, which was to expire at 30 April 1997, would not be renewed. On 18 March 1997 the head of Personnel sent him another letter about the amount of his indemnity; it had been worked out on the strength of his six years' service as an auxiliary and established staff member since 1 February 1991, the date at which he had taken up duty as an auxiliary; and so he was entitled to three months' basic salary.

By a letter of 7 May 1997 he appealed to the Director General against the decision of 18 March on the grounds that, having completed 12 years' service since 1 February 1985, he was entitled to the equivalent of five months' basic salary by way of indemnity. He asked for leave to go straight to the Tribunal if his claim was rejected. In a letter of 3 June 1997, the impugned decision, the head of Administration told him that the decision was confirmed and he might go straight to the Tribunal.

B. The complainant challenges the lawfulness of the decision of 27 December 1996 from the head of Administration telling him on the Director General's behalf that no appeal lay against non-renewal. He sees that decision as final rejection of his appeal against the non-renewal.

Contending that for over 12 years he had a fixed-term appointment with the ESO, he cites Article R II 1.16 of the Staff Regulations as in force at 1 April 1993:

> "Staff members shall receive on appointment a fixed-term contract of not more than 3 years' duration. This contract may be renewed or extended once or more often to cover a maximum total period of not more than 9 years. After this period of 9 years, the Director General will grant an indefinite contract, or the contract will be terminated."

By a decision of 20 October 1989 the Director General gave the complainant one last renewal of contract as a "fellow" for one year. He contends that that was a mistake of law. According to Article R II 1.21 of the Staff Regulations as then in force the initial contract granted to a fellow, which must be for one year, may be extended by one year but only exceptionally by a third. Since the complainant took up duty on 1 February 1985 as a fellow the ESO should have granted him a contract from 1 February 1988 as an auxiliary or established staff member. The reasons that led the ESO to count auxiliary service for the purpose of granting him an indefinite appointment should apply also to his stint as a fellow, especially since his duties never changed. Citing Judgments 701 (*in re* Bustos), 1385 (*in re* Burt) and 1634 (*in re* Gawlitta), he submits that the distinction drawn between the sorts of appointment he held is artificial.

Since he ought to be treated as having served as a staff member from the outset the Director General erred in law in reckoning his indemnity on the strength of a fixed-term appointment for only six years.

He seeks the quashing of the decision of 3 June 1997 and an award of costs.

C. In its reply the ESO argues that the final decision was the one of 18 March 1997 and that the complaint, not having been filed until 29 August 1997, missed the time limit of ninety days in Article VII(2) of the Tribunal's Statute. The one of 3 June 1997 merely confirmed the earlier one and gave the complainant leave to go straight to the Tribunal.

In the ESO's submission the complaint is in any event devoid of merit. Articles R II 6.13 and R IV 1.48 of the Staff Regulations and Annex R A 10 apply to auxiliaries and to established staff members. Only in exceptional cases will the Tribunal, as it did in Judgment 1385, look behind "the mere wording of the texts to ascertain the parties' real intention".

The defendant acknowledges a flaw in the decisions to grant the complainant new appointments as a fellow after he had served for three years as such. But he consented to the terms of those appointments on signing the contracts and thereby forfeited any right to challenge them. Besides, he was granted from 1 February 1991 contracts as an auxiliary and then as an established staff member. So the proper application of the Staff Rules and Regulations for six years cured any flaw in the earlier contracts.

D. In his rejoinder the complainant observes, as to receivability, that the main purpose of his appeal of 7 May 1997 was to challenge the decision of 18 March. Only to save time did he seek leave to go straight to the Tribunal. He was not to know that his appeal would fail and that he should regard the original decision as the final one.

He presses his pleas on the merits. He contends that the impugned decision was unlawful from the outset and rested on a misappraisal of the evidence. There is nothing to prevent him from pleading its unlawfulness now. Citing Judgment 1317 (*in re* Amira), he contends that his contractual relations with the ESO were flawed with "inadmissible administrative practice".

E. In its surrejoinder the Observatory acknowledges the Tribunal's ruling in Judgment 1739 (*in re* Ansorge) that the time limit in Article VII(2) of its Statute starts on notification of waiver of the internal appeal.

But it presses its pleas on the merits. It contends that the complainant may not rely on Judgment 1634: he was not denied the protection of the material rules, and the contracts he signed reflected the parties' true intent.

CONSIDERATIONS

1. The background to this case is set out in Judgment 1738, which ruled on Mr. Adorf's first complaint.

2. His contract with the ESO was to end on 30 April 1997 for the reasons set out in that judgment. On 18 March 1997 the head of Personnel sent him a letter about the indemnity he was entitled to on termination.

3. Disagreeing with the amount, he wrote on 7 May 1997 asking the Director General to review it or, failing that, let him go straight to the Tribunal because only issues of law were at stake.

4. On 3 June 1997 the head of Administration wrote to him on the Director General's behalf confirming the decision of 18 March 1997 and giving him leave to go straight to the Tribunal. According to the complaint form the final decision he is challenging is the letter of 3 June 1997.

5. Impugning as it does that decision, the complaint is receivable for the same reasons as those explained in Judgment 1739 (*in re* Ansorge) under 7. The defendant acknowledges as much in its surrejoinder.

6. The complainant says that in breach of the 1983 version of Article R A 10(b) the ESO has paid him an indemnity reckoned on the strength of only six years' service though he was on its staff for over twelve years.

7. The defendant's answer is that the reckoning is right because it is in line with R II 6.13, R IV 1.48 and R A 10(b). In its submission the complainant had only six years' unbroken service: it takes 1 February 1991, the date at which he signed his contract as "auxiliary", as the start of his service as a staff member, and it discounts the period from 1 February 1985 to 31 January 1991, when he was a "fellow".

8. The provisions that the defendant is relying on say that staff members and auxiliaries are entitled, when their contracts are not renewed, to indemnities in amounts equivalent to half a month's basic salary for each complete year of unbroken service, up to a maximum of five months' basic salary.

9. The defendant has misread its own rules. For the purpose of reckoning the total period of unbroken service they do not, as it makes out, distinguish between a year served as a "fellow" and a year served as a staff member or auxiliary.

10. So the impugned decision cannot stand. The complainant completed 12 years' unbroken service at the Observatory and in keeping with the rules is entitled to payment of an indemnity equivalent to the maximum, i.e. five months' basic salary, less any amount that he has already been paid on that score. He is also entitled to 10,000 French francs in costs.

DECISION

For the above reasons,

1. The Director General's decision of 3 June 1997 is set aside.
2. The Observatory shall pay the complainant a termination indemnity in an amount equivalent to five months' basic salary, less any sums already paid to him under that head.
3. It shall pay him 10,000 French francs in costs.

In witness of this judgment, adopted on 18 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

A.B. GARDNER

Registry's translation,
the French text alone
being authoritative.

EIGHTY-SIXTH SESSION

***In re* Aymon (No. 4),**
Borghini (No. 5) and Vitasse

Judgment 1791

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr. Marcel Aymon, the fifth filed by Mr. Michel Borghini and the one filed by Mr. Michel Vitasse against the European Organization for Nuclear Research (CERN) on 18 August 1997 and corrected on 19 November 1997, CERN's replies of 23 March 1998, the complainant's rejoinders of 6 July and the Organization's surrejoinders of 14 October 1998;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. In December 1994 the Council of CERN decided to build a large hadron collider (LHC). In approving the project it had before it estimates of the Organization's budgets from 1995 to 2008.

In mid-1996 the Government of Germany announced that it would be contributing less to CERN in 1997-2000 because of unexpected cuts in its own federal budget. That prompted debate in the Finance Committee and the Committee of Council. The upshot was a decision, not to make special arrangements just for Germany, but to reduce all contributions because all member States were in financial straits, save that the collider project was not to suffer on that account.

In a letter of 13 November 1996 the Director-General announced that most member States wanted to spend less on staff; management was to make proposals for cutting the staff budget by up to 2 per cent as from 1 January 1997; but he hoped that measures that would heed suggestions from the Staff Association might help the Organization to get through.

The Staff Association had drawn up a set of proposals and put them to the Standing Concertation Committee for a "time off purchase and savings" plan and for progressive retirement, both to be voluntary.

Management held meetings in November 1996 with representatives of the Association. On the 26th it put to a body known as the Tripartite Employment Conditions Forum (TREF) proposals for progressive retirement and for cuts in take-home pay against time off to be taken later. The Association would not hear of compulsory measures, the representatives of member States in TREF approved of the proposals.

On 18 December the Finance Committee decided on a set of recommendations to the Council: take-home pay was to be cut in return for time off to be taken later: the cut would be partly compulsory, in an amount equivalent to 2.5 per cent of basic pay in 1997, and partly voluntary, over a longer period; and a programme of progressive retirement should start on 1 April 1997.

On 19 December 1996 the Committee of Council endorsed the Finance Committee's recommendation on the staff budget and decided to recommend to the Council a resolution to that effect. The Council adopted the resolution the next day.

By a letter of 16 January 1997 the Director-General told the staff of the Council's decision of December to reduce the contributions of member States.

In January 1997 CERN applied the 2.5 per cent "crisis levy" to staff pay and so informed the staff in pay slips dated the 24th.

On 7 February Mr. Borghini appealed against the Council's decision of 20 December 1996 to apply the crisis levy, and Mr. Aymon and Mr. Vitasse followed suit on 10 February.

In a letter of 22 May 1997 – the impugned decision – and another of 20 June the Director-General said that since their case rested on a decision by the Council internal appeals were not advisable and he gave them leave to go straight to the Tribunal.

B. The complainants have four pleas.

The impugned decision is unlawful because CERN gave the wrong reasons and drew blatantly wrong conclusions from the evidence. Germany was the only member State to have pleaded an economic crisis warranting cuts in the staff budget. The reason why it had sought a reduction in its contribution was not financial constraint but its resolve to close the gap, as to pay especially, between international civil servants and national ones. CERN's finances were not so shaky as to warrant imposing cuts in pay.

The impugned decision amounts to breach of the independence of the international civil service. CERN bowed to the wishes of a single member State and fell in with a national policy actuated by nothing but national interests. So much is plain from a report of 10 March 1997 by the German Ministry of Finance.

The decision also shows abuse of authority: CERN made no attempt to find some way of leaving contractual pay alone. Contrary to what it has let on, it did not even look into the possibility of voluntary action.

The impugned decision is in breach of the complainants' acquired rights. Citing precedent, they contend that their contracts, particularly the clauses on pay, are inviolate. Amendment without their consent was in breach of contract.

The 2.5 per cent cut broke their right to a steady level of pay. The result is a cumulative reduction in purchasing power of 11.6 per cent for Mr. Aymon, 31.2 for Mr. Borghini and 25.6 for Mr. Vitasse.

Lastly, they submit that the Organization disregarded the Noblemaire principle (see Judgment 825 *in re* Beattie and Sheeran).

They seek the quashing of the Director-General's decision of 22 May 1997 and costs.

C. In its replies CERN rebuts all their pleas.

The impugned decision did not rest on mistaken grounds or on mistaken findings of fact. The Organization's finances were in serious trouble: only two years after approving the collider project member States were reviewing the budget for it and demanding heavy cuts.

Although Germany was the first officially to plead shortage of money, most member States were feeling the pinch.

The assertion that Germany wanted CERN staff to earn less does not stand up: the cuts demanded and made in the budget as a whole are much higher than the 2 per cent cut in expenditure on the staff.

There was no escaping the levy: unspent monies had since 1994 been put in the "LHC reserve".

The impugned decision is quite in keeping with the independence of the international civil service. The levy was decided on unanimously by the Council, CERN's sovereign body, to which the Director-General is accountable and subordinate in law. The report of the German Ministry of Finance afforded neither the basis in law nor the reason for the decision. CERN did not overstep its authority: the levy was the best expedient and management never made out that it had looked into schemes for which the staff might volunteer.

Nor does the decision impair the complainants' acquired rights. It is not in breach of their contracts. It was just an ad hoc expedient resorted to in an emergency. It applied for only one year, was offset by additional leave and did not affect basic pay, allowances or social benefits. Besides, as was said in Judgment 391 (*in re* de Los Cobos and Wenger), an unforeseen event beyond the control of the parties may be tantamount to *force majeure* and warrant unilateral amendment of employment contracts by an organisation. That is just what happened at CERN late in 1996 and what brought about the levy.

There was no breach of the complainants' acquired right to a steady level of pay: the losses they say they have suffered are "sheer make-believe", and citing Noblemaire makes no sense.

D. The complainants rejoin that CERN makes a mistake of fact in describing the Director-General as subordinate to the Council: he has invariably made proposals before getting instructions from it. It also makes a mistake of law in that there is nothing to stop him from taking a stand against any decision he deems unlawful.

CERN did mislead them. It made, not the promised inquiry into what could be done, but a dubious assessment of what they wanted, and it did not even ask them. That was deplorably remiss.

It is to their mind astonishing that CERN should plead *force majeure* to excuse the breach of contract. It has failed to show that it could not otherwise get out of its predicament.

E. In its surrejoinders CERN objects that the complainants are meddling in the management of its finances.

It did go into things properly. What the complainants are bitter about is that the outcome was not the one they wanted. But in concluding that there was a need for the levy management was just using its prerogative.

CERN has been relying, not on *force majeure* but on "exceptional circumstances", a notion well known to administrative law.

CONSIDERATIONS

1. The complainants are employees of the European Organization for Nuclear Research. Mr. Aymon has had a permanent appointment since 1 October 1984, Mr. Borghini since 1 October 1968 and Mr. Vitasse since 1 July 1997.

2. On 20 December 1996 the Council of CERN unanimously adopted a resolution on the budget for staffing in 1997. It reads:

> "THE COUNCIL
>
> Considering
>
> the substantial economic and financial difficulties currently prevailing in Europe and their impact on the capacity of CERN's Member States to finance the Organization's activities;
>
> Considering
>
> that the savings already achieved leave no further room for a significant reduction in the Organization's materials budget without jeopardising CERN's activities and that there is therefore occasion, on the one hand, to call upon the staff of the Organization to make an effort that would make it possible to limit the aforementioned financial difficulties for 1997 and, on the other, to examine suitable measures to meet the budget constraints of subsequent years;

> Considering also
>
> the request of the Committee of Council of 7 November 1996, the discussions at TREF on 21 November 1996 and at the Standing Concertation Committee (SCC) on 4 December 1996, document CERN/FC/3942 - CERN/2164, entitled 'Proposed Actions concerning the 1997 Personnel Budget' and the Finance Committee's recommendations of 18 December 1996;
>
> **notes** the exceptional financial circumstances in which the Organization finds itself and **approves** the measures provided for in document CERN/FC/3942 - CERN/2164."

3. Two of the "measures provided for in document CERN/FC/3942 - CERN/2164" were a reduction of not more than 2 per cent in the staff budget and, for 1997, a cut in take-home pay in consideration for leave to be taken later. The cut in pay was in two parts. One was to be compulsory, equivalent to 2.5 per cent of basic pay and applied from 1 January to 31 December 1997; the other voluntary, equivalent to a further reduction of 2.5, 5 or 7.5 per cent of basic pay and applied from 1 February 1997.

4. By a letter of 16 January 1997 the Director-General told the staff of the Council's decisions on the budget. The 2.5 per cent reduction in pay was applied to the complainants in January 1997 and notified to them in pay slips dated 24 January.

5. On 7 February 1997 Mr. Borghini filed an internal appeal against the Council's decision of 20 December 1996 to apply the levy. Mr. Aymon and Mr. Vitasse followed suit on the 10th. By letters of 22 May and 20 June 1997 the Director-General allowed the complainants to come straight to the Tribunal on the grounds that the internal appeals served no purpose. It is the decision of 22 May that they are challenging in their complaints, which they filed on 18 August 1997. They seek the quashing of the decision and any consequent redress.

6. In their submission the Director-General's decision of 22 May 1997 is unlawful: CERN gave wrong reasons for it; drew blatantly wrong conclusions from the evidence; acted in breach of the independence of international civil servants; was guilty of abuse of authority; acted in breach of contract; and impaired their acquired right to a steady level of pay.

7. In support of their plea that the impugned decision rested on wrong reasons and wrong conclusions they contend that CERN was mistaken in its explanation: there was in fact no financial crisis warranting a compulsory pay cut. Only one member State pleaded such a crisis as a pretext for reducing the staff budget. And the reason why Germany wanted a lower contribution was not financial stringency but its wish to see international civil servants fare little or no better than national ones, particularly as to pay.

8. The plea fails. The evidence, and particularly the Council's resolution of 20 December 1996, shows that CERN's member States had not been spared the economic and financial plight of Europe at the time and so were much less able to fund the Organization. That was why, only two years after approving its collider project, they had to think again about the budget for building the collider and demand a big cut. The Tribunal is satisfied on the evidence that CERN did not give wrong reasons or draw any blatantly wrong conclusions.

9. In support of their plea of abuse of authority the complainants accuse CERN of scorning not only the independence of the international civil service by giving in to a single government that was itself defying the principle, but also its own broad interests by cutting the budget in the way it did.

10. That plea too is devoid of merit. There is not a shred of evidence to suggest that CERN was yielding to German insistence or that Germany was unmindful of the principle of independence. The impugned decision was taken because of a resolution by the Council, the sovereign body that decides things scientific, technical and administrative at CERN. The report of a German government department, which the complainants cite, did not afford the basis for the impugned decision.

11. No more cogent is the plea that CERN forgot its own interests in the way it cut its budget. It is plain from the paper headed "Scope for further budget reductions at CERN?" and from other evidence that management went into every means of coping on the smaller budget and combed every item in search of savings that would neither harm the

Organization's broad interests nor lay it open to the risk of losing funds from countries like Japan and the United States that were not Members.

12. Next comes the plea that management misled staff by giving out that it had made an inquiry to see how many of them might be interested in voluntary cost-cutting measures. The point is neither here nor there. What the Director-General spoke of in his letter of 16 January 1997 was, not an inquiry, but thorough research into the financial consequences of such measures.

13. The complainants plead breach of their acquired rights in that CERN infringed the terms of their contracts of service and their acquired right to a steady level of pay. Citing many precedents, they argue that those terms are inviolate, particularly the clauses on pay.

14. Judgments 391 (*in re* de Los Cobos and Wenger) and 1118 (*in re* Niesing No. 2 and others) – to cite but two – declare that exceptional circumstances may warrant amending contracts of service. The financial crisis at CERN at the material time did amount to exceptional circumstances that warranted the slight reduction in pay that CERN applied, for only one year anyway and in consideration for extra time off.

15. The complainants contend that in any event the impugned decision was in breach of one of their basic and essential terms of employment, their right to a steady level of pay. Citing Judgments 831 (*in re* Abdilleh and Salah), 986 (*in re* Ayoub No. 2 and others), 1334 (*in re* Abraham and others) and 1514 (*in re* Aymon No. 2 and others), they maintain that, whether the Staff Regulations or Staff Rules say so or not, the pay of international civil servants must not suffer undue erosion. To their mind the Organization acted in breach of the general principle of the international civil service known as Noblemaire.

16. The Tribunal is satisfied that there was no breach here of any principle of the international civil service. As was said in 14 above, the measure the complainants are objecting to was exceptional and limited in time. As for their right to a steady level of pay, that measure neither

changed the pay scales nor had any impact whatever on terms of employment in the long term. The conclusion is that there was no breach of acquired rights.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 18 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-SIXTH SESSION

***In re* Najjar and Voetsch**
(Applications for execution)

Judgment 1792

THE ADMINISTRATIVE TRIBUNAL,

Considering the applications filed by Mr. Ziad Hussni Mussa Najjar and by Mr. Robert James Voetsch on 6 February 1998 for the execution of Judgments 1625 (*in re* Gray) and 1629 (*in re* Schopper), the replies from the World Health Organization (WHO) of 8 April to Mr. Voetsch's application and of 20 April to Mr. Najjar's, the complainants' rejoinders of 9 July and the WHO's surrejoinders of 12 October 1998;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Considering that the applications raise the same issues and should therefore be joined to form the subject of a single ruling;

Having examined the written submissions;

CONSIDERATIONS

1. By Judgments 1625 (*in re* Gray) and 1629 (*in re* Schopper) of 10 July 1997 the Tribunal allowed complaints by two staff members whom the WHO had employed on its Global Programme on AIDS (GPA) and whose appointments it had ended on 31 December 1995. The Tribunal held that their posts had been of unlimited duration and that the Organization had been wrong to abolish them without following the reduction-in-force procedure provided for in Staff Rule 1050.2. Fifteen other staff members had applied to intervene in the two complaints on the grounds that they were in like case. The Tribunal allowed their applications on the grounds that

they had "the same rights as the [complainants], save as to costs, insofar as they are in the same position in law and in fact". The Organization thereupon reconsidered the cases of the interveners. It granted redress to eleven of them but came to the view that the other four were not in like case in law and in fact. Two of those four, who had held posts in the Sudan, are now challenging letters of 11 November 1997 rejecting their claims and are asking the Tribunal to order the WHO to grant them the same redress as Judgments 1625 and 1629 awarded.

2. Someone who intervenes in a complaint, and who thereby claims the benefit of the judgment without ordinarily bothering to exhaust the internal remedies and appeal to the Tribunal within the set time limits, may not put forward any pleas but the complainant's. The intervener must have the same claims as the complainant and seek the same redress on the strength of the same pleas. As was said in Judgments 365 (*in re* Lamadie No. 2 and Kraanen) and 366 (*in re* Biggio No. 3 and others), interveners -

> "are entitled to join [proceedings] in so far as their factual and legal position is identical or at least similar to that of the complainants. Since they themselves failed to file a complaint in time, however, they may neither put forward pleas nor lodge claims which differ from those of the complainants."

The defendant is citing such precedent in support of its contention that the complainants, who intervened in the earlier cases, may not now put forward claims and arguments other than those of the complainants whose cases the Tribunal allowed in Judgments 1625 and 1629.

3. In fact the interveners in those cases did put forward the same claims as the complainants. Complainants and interveners alike were arguing that the WHO had wrongfully abolished their posts and that they were entitled to reinstatement, to the reduction-in-force procedure and to awards of damages. The pleas which those complainants put forward, and which the Tribunal allowed, were that, contrary to what the WHO was maintaining, their posts had been of unlimited duration and Staff Rule 1050.2 had therefore required the Organization to follow the reduction-in-force procedure before ending their appointments. As the Tribunal reads the present pleadings, the complainants, who were then interveners, are not offering radically different arguments since they too are contending that

their posts were of unlimited duration and the Organization should have treated them accordingly. But the defendant is right in answering that they are not in quite the same position as the complainants who got redress; so the reasoning of Judgments 1625 and 1629 may not apply to them without qualification.

4. The material issue, then, is whether the differences preclude allowing the present complainants the same relief.

5. Those who won their case had held posts which the WHO created and abolished in keeping with Manual Section III.3. In compliance with the material rules the Organization had filled up form 172, which described the posts either as "indefinite, subject to continued need and availability of funds" or as "time-limited ... for a period of two years from the date of recruitment, extension of post subject to continued need and availability of funds". Judgment 1629 held in 14 and 16 that when the form called the post one of indefinite duration Staff Rule 1050.2, which prescribed the reduction-in-force procedure in the event of abolition, ought to apply. Judgment 1625 said in 15 that that was so even when at the outset form 172 said that the post was created for two years but on the expiry of that period it was extended without any limit of duration. That was the consequence of Rule 1050.6:

> "Posts of indefinite duration comprise those that continue in existence unless and until an express decision is taken to abolish them. Posts of limited duration automatically lapse at the end of the period for which they were established unless an express decision is taken to continue them. The Director-General shall determine the categories of posts falling within each of the above two definitions."

6. But the present two complainants are in not at all the same position as were the staff members whose complaints Judgments 1625 and 1629 allowed. For one thing, they were recruited on posts created by the Regional Office for the Eastern Mediterrean (EMRO) under procedures different from those that governed posts at headquarters. They were posts under country projects, which, unlike the posts of the successful complainants, were not governed by Manual Section III.3 and for which the Organization did not fill up form 172. But even more telling is the fact that the posts of the present complainants were linked to country projects in the Sudan under

programmes that the Organization renewed each year for a limited period, the final date of expiry being 31 December 1995. As was said in Judgment 515 (*in re* Vargas) -

> "Where a post is attached to a project and the length is not specifically prescribed, its length will be the length of the project; if the project is of limited duration, the post likewise will be of limited duration."

WHO Manual paragraph II.9.260 treats posts under country projects as of limited duration, and that is why the Tribunal will not apply the reduction-in-force procedure to staff on such posts: see Judgments 1727 (*in re* Curina) and 1775 (*in re* Rwegellera No. 2). It is clear on the evidence that the complainants' posts - 7.3450 and 7.3451 - came under a country project (Sudan GPA 200) and that the last extension of that project ran to 31 December 1995. It may be a pity that the WHO did not tell the complainants in plainer terms that their posts were of limited duration, but many administrative documents do explicitly refer to the project in the Sudan. At all events the complainants were not in the same position in fact and in law as those whose complaints they intervened in, and the WHO was therefore right to refuse them the redress granted to holders of posts of indefinite duration.

7. There being no need to allow the complainants' application for leave to enter further submissions, the Tribunal dismisses their claims in their entirety.

DECISION

For the above reasons,

The applications are dismissed.

In witness of this judgment, adopted on 18 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

MICHEL GENTOT JULIO BARBERIS SEYDOU BA

A.B. GARDNER

Registry's translation,
the French text alone
being authoritative.

EIGHTY-SIXTH SESSION

In re Aye Han and Renas

Judgment 1793

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Miss Daw Aye Han and Mr. Richard William Renas against the World Health Organization (WHO) on 9 March 1998, the WHO's replies of 9 June, the complainants' rejoinders of 9 July and the Organization's surrejoinders of 8 and 9 October 1998;

Considering the applications to intervene in Miss Aye Han's complaint filed by:

Emmanuel Batururimi
Raúl Boyle
Kouadio Honoré Dibi
Wonderful Baisie Ghartey
Carol Ann Larivee
Pierre Charles Leduc
Marthe Mpendubundi
Idrissa Sow
Abdoulaye Tounkara
Abdullah Ziai

Considering the WHO's observations of 14 September 1998 on the applications;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. In Judgments 1624 to 1631 of 10 July 1997 the Tribunal allowed complaints from employees of the WHO's Global Programme on Aids (GPA) against decisions to end their appointments on the grounds of the abolition of their posts at 31 December 1995. The Tribunal held that their posts had been of indefinite duration and quashed the impugned decisions because the Organization had failed to carry out the "reduction-in-force" procedure required by Staff Rule 1050.2 and had taken no individual decisions to abolish the posts.

Miss Aye Han is a citizen of Myanmar who was born in 1952. The WHO recruited her in November 1992 as a technical officer at grade P.3. It granted her a two-year fixed-term appointment, which it extended until 31 December 1995. It assigned her to the GPA at Freetown, in Sierra Leone. By a letter of 9 August 1995 a personnel officer of the WHO's Regional Office for Africa told her that her post was to be abolished at 31 December 1995 and her appointment would not be renewed beyond that date. At her request the Organization then put her on leave without pay for six months, until 30 June 1996. When she filed this complaint she was on a short-term appointment in the programme known as UNAIDS jointly sponsored by the United Nations and the WHO.

Mr. Renas, who was born in 1953, is a citizen of the United States. The Organization assigned him in December 1992 under the GPA to Phnom Penh, in Cambodia, as a technical officer at grade P.4. It extended his original two-year appointment to 31 December 1995. By a letter of 25 December 1995 a personnel officer of the Regional Office for the Western Pacific told him that his appointment would not be renewed after 31 December.

By a letter of 20 October 1997 the Director of the Division of Personnel told former GPA employees who had not gone to the Tribunal that if they felt they were in the same position in law and in fact as those who had they might ask to have the Tribunal's rulings applied to them. Mr. Renas did so on 5 November and and Miss Aye Han on the 21st. By letters of 19 January 1998 the Director refused their claims on the grounds that they had not been in the same position as those whose complaints the Tribunal had allowed. By a letter of 26 February 1998 he informed their counsel that the Organization gave them leave to challenge the decisions of 19 January 1998 directly before the Tribunal.

B. The complainants cite a letter of 14 December 1995 from the competent Assistant Director-General to the chairman of the headquarters Staff

Committee saying that the Tribunal's rulings would hold good for other GPA staff in the same position in law and in fact. They point out that form 172, headed "Notification of decision on position request" and issued by the Budget unit on 3 February 1992, described their posts as "indefinite"; so they were on a par with those who won in Judgments 1624 to 1631.

They ask the Tribunal to order the WHO to apply to them the rulings in those judgments and to award them 2,500 Swiss francs each in costs.

C. The WHO points out in its replies that the Assistant Director-General's letter of 14 December 1995 made it plain that anyone who wanted to put things beyond doubt must file a complaint or an application to intervene with the Tribunal. Although the Organization had good reason to apply the judgments only to complainants and interveners, it consented to letting anyone else in like case in fact and in law benefit too. But the complainants were not in like case: they held posts under field projects, one in Sierra Leone and the other in Cambodia, and the projects ended on 31 December 1995. The rules on creating and abolishing project posts are not the same as for posts at headquarters. And WHO Manual II.9.260.3 is explicit: country project posts are of limited duration.

D. In their rejoinders the complainants submit that the distinction between headquarters and project posts is immaterial because form 172 described theirs as "indefinite". Although they were project posts, they were created at headquarters under the applicable procedure and by a decision of the Director-General recorded in form 172. So the procedure was the same as the one the Organization followed in creating the posts the Tribunal declared indefinite. Rejecting the complainants' claims is discriminatory. They cite the cases of two former GPA employees who, like them, used to be on field project posts and whom the Organization did allow to benefit from the Tribunal's rulings.

E. In its surrejoinders the WHO presses its pleas. It denies discriminating against anyone in dealing with the claims of former GPA employees.

CONSIDERATIONS

1. In judgments of 10 July 1997 the Tribunal ruled on complaints from staff of the WHO who used to work for its Global Programme on AIDS (GPA) and whose appointments it had ended on 31 December 1995. Rejecting the WHO's case, the Tribunal held that their posts were to be treated as indefinite and that, having failed to apply the reduction-in-force procedure required under Staff Rule 1050.2, the Organization had not properly abolished them. The judgments are numbered 1624 to 1631: *in re* Clements, Gray, Lewis, Ratcliffe, Sato, Schopper, Stoneburner and Wabitsch. Other staff had applied to intervene in some of those cases and the Tribunal allowed their applications provided that they were in the same position in law and in fact as the successful complainants.

2. On 20 October 1997 the Director of the Division of Personnel sent the following letter to all former employees of the GPA:

> "Before the Tribunal issued these Judgments, the Administration said that rulings made with respect to one staff member would apply to other former GPA staff members with the same claim and fact situation. The Administration repeatedly emphasized, however, that to avoid any dispute concerning whether staff members had the same claim and fact situation, interested staff should intervene in the cases that were already before the Tribunal, thus allowing the Tribunal to make a definitive ruling on the issue. It was stressed that staff members who chose not to file a complaint with the ILOAT, or who did not intervene in a complaint, would not have the benefit of the Tribunal's clarification and thus risked future uncertainty as to the application of the Judgment.
>
> Keeping this in mind, if you consider that you have the same claim and are in the same fact situation as a complainant, you remain free to make a written claim stating the full particulars of your claim, including its factual basis, and the remedy requested."

3. On getting that letter the complainants and 76 other former GPA staff who had not intervened in complaints wrote to the Director professing to be in the same position as those who had won. The WHO allowed 47 of those cases and rejected the others. In letters of 19 January 1998 the Director turned down the complainants' claims on the grounds that, having been on country project posts which had expired on 31 December 1995, they were not in the same position as those who had been on indefinite ones.

That is the decision which, the WHO having waived internal appeals, they are impugning, and there are ten applications to intervene in their complaints.

4. The two complainants are in like case and the Tribunal will join their complaints to form the subject of a single judgment.

5. The case is straightforward enough. The complainants neither lodged complaints of their own against the termination of their appointments and the abolition of their posts nor intervened in earlier complaints; so the Organization might have rejected their claims as time-barred. But out of an understandable sense of fairness it decided otherwise, and the Director of Personnel's letter of 20 October 1997 conferred rights on staff who were in the same position in fact as those whose complaints had succeeded. The only material issue is whether their holding country project posts was a point of difference that warranted denying them the benefit of the Tribunal's ruling.

6. The Tribunal has no doubt about the answer. As it rules in Judgment 1792 (*in re* Najjar and Voetsch), also delivered this day, posts under field projects will as a rule fare as do the projects themselves. If the project is of limited duration, so too will be the post. One complainant had post 3.3847, created for a project (GPA 200) in Sierra Leone, which ended on 31 December 1995. The other held post 8.1933, created for a project (also GPA 200) in Cambodia, which ended at the same date. Neither post was intended to survive the project it came under; so neither may be treated as indefinite.

7. In rebuttal the complainants argue that the WHO created their posts under a procedure using form 172, which described the posts as indefinite, and the Tribunal relied on that form in allowing the earlier cases in Judgments 1624 to 1631.

8. They are misreading the reference to form 172 in those judgments.

9. Miss Aye Han has produced such a form declaring her original post on recruitment to be "indefinite, subject to continued need and availability of funds". But that was post 1.3902, one at headquarters she was

put on in February 1992. It was not post 3.3847, the country project post, coming under the Regional Office for Africa, that she was assigned to in November 1994 on a fixed-term appointment for the fourteen months up to 31 December 1995.

10. The case of Mr. Renas is not so clear-cut. He was on post 8.1933 in Cambodia, and the form 172 he produces does say that it was indefinite. Why the WHO used the form at all is hard to see. The Organization shows that it created post 8.1933 in May 1992 as a project post. Yet two months later it issued form 172, which was obviously irrelevant, with the odd annotation "For record purposes only". But whatever mistake it may have made on that score, the post was plainly bound up with the project in Cambodia, which was of limited duration, and could not outlast it.

11. The conclusion is that neither of the complainants was in the same position as staff members recruited on headquarters posts that proved to be of unlimited duration. By refusing to let them have the benefit of the judgments the Organization did not act in breach of the commitments it entered into in its letter of 20 October 1997.

12. Since the complaints fail, so must the applications to intervene.

DECISION

For the above reasons,

The complaints and the applications to intervene are dismissed.

In witness of this judgment, adopted on 18 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

MICHEL GENTOT JULIO BARBERIS SEYDOU BA

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-SIXTH SESSION

***In re* Steele (No. 4)** **Judgment 1794**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr. David Brian Steele on 23 June 1998 against the International Labour Organization (ILO);

Considering Article II, paragraph 1, of the Statute of the Tribunal and Article 7 of its Rules;

Having examined the written submissions;

CONSIDERATIONS

1. Mr. Steele left the staff of the International Labour Organization at the end of 1975. Judgment 1691 dismissed as clearly irreceivable the third complaint which he had lodged against the Organization. On 7 February 1998 he again put his claims to the Director-General. In this complaint he is challenging the implied rejection of them.

2. This complaint is no more receivable than the one dismissed in Judgment 1691. That judgment explained that he was asking for -

> "a final decision on a request by him for a suitably organised internal inquiry which, if positive, would result in compensation and redress for the various injuries he had alleged"

and held that his complaint was -

> "not based on any allegation of non-observance in substance or in form of the terms of his appointment or of the provisions of the ILO Staff Regulations."

The claims which the complainant put to the Director-General on 7 February 1998 are the same as before, and he is not pleading breach of the terms of his appointment or of the ILO's Staff Regulations. So this complaint too must fail.

3. Even were it treated as an application for review it offers no grounds for overturning Judgments 310 and 1691, which are *res judicata*.

4. The complaint being clearly irreceivable, the Tribunal dismisses it under the summary procedure in Article 7 of its Rules.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 18 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

MICHEL GENTOT JULIO BARBERIS JEAN-FRANÇOIS EGLI

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-SIXTH SESSION

In re **Steele (No. 3)**

Judgment 1795

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr. David Brian Steele on 23 June 1998 against the World Health Organization (WHO);

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 7 of its Rules;

Having examined the written submissions;

CONSIDERATIONS

1. Mr. Steele left the staff of the World Health Organization on 30 June 1985. Judgment 1692 dismissed as clearly irreceivable the second complaint which he had lodged against the Organization. On 7 February 1998 he again put his claims to the Director-General. In this complaint he is challenging the implied rejection of them.

2. This complaint is no more receivable than the one dismissed in Judgment 1692. That judgment explained that he was asking for -

> "a final decision on a request by him for a suitably organised internal inquiry which, if positive, would result in his 'reintegration' and compensation and redress for the various injuries he had alleged"

and held that his complaint was -

> "not based on any allegation of non-observance in substance or in form of the terms of his appointment or of the provisions of the WHO Staff Regulations."

The claims which the complainant put to the Director-General on 7 February 1998 are the same as before, and he is not pleading breach of the terms of his appointment or of the WHO's Staff Regulations. So this complaint too must fail.

3. Even were it treated as an application for review it offers no grounds for overturning Judgments 789 and 1692, which are *res judicata*.

4. The complaint being clearly irreceivable, the Tribunal dismisses it under the summary procedure in Article 7 of its Rules.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 18 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

MICHEL GENTOT JULIO BARBERIS JEAN-FRANÇOIS EGLI

A.B. GARDNER

*Registry's translation,
the French text alone
being authoritative.*

EIGHTY-SIXTH SESSION

***In re* de Munck** **Judgment 1796**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Roland de Munck against the Food and Agriculture Organization of the United Nations (FAO) on 10 July 1997 and corrected on 12 September, the FAO's reply of 30 December 1997, the complainant's rejoinder of 23 April 1998 and the Organization's surrejoinder of 10 July 1998;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Belgian who was born in 1939, joined the staff of the FAO on 20 November 1989. He was the coordinator of a project for regional cooperation in the development of market-garden produce in West Africa. His grade was P.5 and he was stationed at Dakar, in Senegal. His original appointment was for one year, but he had it renewed several times. He was promoted to grade D.1 on 1 October 1993. His last contract was to expire on 31 December 1995.

At a meeting at the end of May 1995 the FAO's Representative in Senegal told him of a decision to remove him from the project for not keeping office hours. By a memorandum of 12 June the Representative informed the Director of the Field Operations Division that the Senegalese "counterpart authority" had objected to the complainant's poor time-keeping and absences, he had ordered an inquiry, and the objections were upheld; so the complainant must go, and he was asking the Director to "confirm" his decision. At a meeting at headquarters, in Rome, on 26 June the Director handed over to the complainant the text of the Representative's memorandum and asked him to answer. The complainant did so in writing the next day.

By a telegram of 13 July 1995 the Director of the Division of Personnel told him that he would be dismissed on 31 August 1995 under paragraph 370.531(vi) of the FAO's Manual. On 24 August he lodged an appeal with the Director-General. By a letter of 18 September the Assistant Director-General in charge of Administration and Finance told him that the dismissal was revoked, that he was reinstated in the staff but not in his former duties, and that he was to take on other work until his appointment ran out on 31 December 1995. His appointment would not be renewed beyond that date. Was he pressing his appeal? If so, the letter was an interim reply to it. By a letter dated 20 September the complainant answered that he did press his appeal and he claimed both reinstatement as regional coordinator of the project and the renewal of his appointment.

By a letter of 22 November 1995 the Deputy Director-General told him that the Director-General had rejected his appeal.

On 14 February 1996 he went to the Appeals Committee. In its report of 24 January 1997 the Committee held that since his post was to be abolished the Organization had been "right to reassign him and not to renew his contract beyond the scheduled date of expiry". Yet, since the behaviour of the Representative in Senegal had caused him serious moral injury, the Committee recommended granting him financial compensation and treating with "proper administrative objectivity" any application he might make for a field post.

By a letter of 15 April 1997, the impugned decision, the Director-General told the complainant that he was endorsing the Committee's recommendations and was, among other things, willing to offer him 18,537.99 United States dollars – the equivalent of three months' salary – in compensation for the moral injury the Committee had referred to and in "full and final settlement of any claim" he might have under his appointment. The complainant refused that offer.

B. The complainant has four pleas.

First, he contends that he was denied due process. The Organization did not safeguard his right to a hearing and indeed refused to let him have the material he wanted.

Secondly, the conclusions it drew from the evidence were blatantly wrong. As to the decision to take away from him his duties as coordinator, he contends that the allegations in the Representative's memorandum of 12 June 1995 are mistaken. The hours he was keeping were what the efficient working of the project demanded and were due to the unusual physical conditions in which it was being carried out. As for the refusal to renew his contract, the Appeals Committee went beyond the ambit of the defendant's case and was in any event mistaken because the post of coordinator was not abolished.

Thirdly, there was abuse of authority. The complainant says that the FAO's Representative and several headquarters officials caused him injury. He sees in the decision an "ill-concealed disciplinary sanction".

Fourthly, the decision harmed his standing and reputation.

He asks the Tribunal to set aside the decision of 15 April 1997 insofar as it refused to renew his contract and to order the FAO to pay him damages equivalent to three-and-a-half years' salary and allowances at grade D.1, step 9; compensation for the loss of pension entitlements; moral damages; and costs.

C. In its reply the FAO says that the evidence at its disposal shows that, as the complainant has himself acknowledged, he failed to keep office hours.

It sees no point in determining whether it observed the rules on dismissal since it has revoked the dismissal. And it complied with the rules on non-renewal of a fixed-term appointment.

It did not draw clearly mistaken conclusions from the evidence. There was nothing fanciful about the objections from the Senegalese counterpart authority. Nor did the Appeals Committee get the facts wrong: the project did come to an end on 31 December 1995.

There was no prejudice against the complainant. At the meeting of 26 June 1995 he was shown a copy of the attendance sheets which it appends to its brief.

It has already offered him compensation for any injury to his standing and reputation.

D. In his rejoinder the complainant seeks to refute the defendant's pleas. He says that the FAO has never abolished the post of coordinator. Though it did revoke the dismissal, it threw him out of his job and discredited him. The three months' pay that the Director-General is offering him in compensation is just the amount of the termination indemnity and so affords no redress for the discountenance and other injury he has suffered.

He puts the material injury at 677,000 United States dollars.

E. The FAO presses its pleas in its surrejoinder. In answer to the complainant's claim to material damages it points out that a fixed-term appointment carries no expectancy of constant renewal.

CONSIDERATIONS

1. The Food and Agriculture Organization of the United Nations recruited the complainant on 20 November 1989 under a fixed-term appointment for one year. He served at grade P.5 as coordinator of a regional project in West Africa and he was stationed in Dakar. The Organization renewed his appointment several times and promoted him to grade D.1 on 1 October 1993. By a letter of 21 November 1994 it told him of the renewal of his appointment up to 31 December 1995.

2. Late in May 1995, at a meeting he did not attend, the FAO's Representative in Senegal said that he was intending to take the complainant off the project. The Representative told him orally on 31 May 1995 of the decision.

3. On 12 June 1995 the Representative wrote to the Director of the Field Operations Division in Rome to say that he had looked into "oral criticisms" from the Senegalese "counterpart authority" about the

complainant's time-keeping and attendance; he had found the criticisms warranted; the complainant himself had acknowledged as much; he had offered an unacceptable explanation; and he must leave the project. The Director had not, he said, wanted to "cast into perdition" someone who had, after all, won everyone's support for the project and who had suffered "a nasty shock"; but he wanted the decision to be confirmed and the complainant to be removed "from the project and from Senegal". He was against disciplinary proceedings, which "might lead to more drastic action".

4. While on home leave the complainant was summoned to headquarters in Rome. There on 26 June the Director handed over the Representative's letter and called on him to explain orally his conduct in Dakar and to comment in writing. His explanations proved unavailing. By a telegram sent on 13 July 1995 to his address in Belgium the Director of the Division of Personnel told him that he would be dismissed on 31 August 1995. On 24 August he appealed to the Director-General against the decision on both procedural and substantive grounds.

5. On 18 September 1995 the Assistant Director-General in charge of Administration and Finance told him that the decision of 13 July to dismiss him had been revoked; he was reinstated in the staff and in the meantime had been put on special leave with full pay; he would be performing new duties until 31 December 1995, when his appointment, which would not be renewed, was to expire; if he pressed his appeal, he should treat the letter as an interim reply.

6. On 19 September the complainant received, back in Dakar, a description of new duties. They were to consist mainly in "supplementing the technical summing-up of the results of the regional project" and "drafting a synopsis of all the work done and results obtained under contractual service agreements put into effect by the project". In a letter of 20 September to the Assistant Director-General he said that he was pressing his appeal and wanted not only the quashing of the Representative's decision but reinstatement as regional coordinator of the project and the renewal of his appointment. On 22 November 1995 the Deputy Director-General wrote to confirm his new duties and the expiry of his appointment at 31 December 1995. On 14 February 1996 he went to the Appeals Committee.

7. In its report of 24 January 1997 to the Director-General the Committee declared his appeal "receivable as to the reassignment and the non-renewal". It went on: "the project having since undergone change, the Organization was right to reassign him and not to renew his contract beyond the scheduled date of expiry". Yet -

> "since the behaviour of the FAO's Representative ... caused him serious moral injury, the Committee recommends prompt payment of financial compensation for such injury. Moreover, should he wish to apply for a suitable vacancy in the field, the Organization should treat his application with proper administrative objectivity and in line with the procedure."

8. By a letter of 15 April 1997 the Director-General conveyed the Committee's report to the complainant, endorsed its recommendations and offered him moral damages amounting to 18,537.99 United States dollars, the equivalent of three months' pay or the sum he would have got in termination indemnity under the Staff Regulations for "abolition of post, reduction of staff, or in the interest of the good administration of the Organization". That is the final decision he wants to have set aside in that it refused to renew his appointment.

9. He submits that the decision is unlawful because the FAO denied him due process, drew blatantly wrong conclusions from the evidence, and harmed his standing and good name.

10. The Organization replies that it abided by the rules on non-renewal and that he was given his full say: his letters to the Director of Personnel show full awareness of what the attendance sheets said and his submissions at every stage in the proceedings bear out that he had access to the records. It observes that he failed to keep office hours though he neither had leave to set his own, nor had agreed with other staff that they would turn up in the forenoon and he only in the afternoon. It cites a memorandum by the Representative recording the Senegalese counterpart authority's oral criticisms of his poor time-keeping and absences and the attendance sheets of the centre for horticultural development, where his project had premises. It adds that the head of the national institute for agricultural research confirmed the criticisms and the complainant has himself accepted them. The Director-General has discretion to set someone to other duties if he sees

fit. According to Staff Rule 302.907 fixed-term appointments expire "automatically and without prior notice on the expiration date specified in the letter of appointment" and, according to FAO Manual paragraph 305.5123 "Fixed-term appointments do not carry any expectation of, or imply any right to, extension or conversion to any other type of appointment; such appointments expire according to their terms, without notice or indemnity".

11. According to a strong line of precedent both transfer and renewal are at the executing head's discretion and will ordinarily be subject to review only if the decision is *ultra vires*, or if there is a formal or procedural flaw or a mistake of law or of fact, or if a material fact was overlooked or some obviously wrong conclusion drawn from the evidence, or if there is abuse of authority.

12. Here the impugned decision flowed directly from the Representative's memorandum of 12 June 1995 reporting on an inquiry which he said had showed up the complainant's record of attendance and time-keeping as poor. Nothing happened thereafter to warrant the action which, once the dismissal had been revoked, the Organization took. That is plain from the Appeals Committee's report, which the Director-General endorsed and which said that the complainant's hours of attendance had sat loosely to the official timetable and had, on his own repeated admission, failed to match those of the other staff. The Committee saw the charges of absenteeism and "low output" as gratuitous.

13. Contrary to the FAO's assertions – partly echoed by the Appeals Committee – the complainant did not explicitly admit to the charges. They rest on nothing but attendance sheets that show when vehicles entered and left the centre's premises. In his letter of 27 June 1995 to the Director of the Field Operations Division the complainant maintained that, whatever hours he kept, he was working properly and efficiently as coordinator; his accusers were lying in trying to make out – on the pretext of his irregular hours – that he was spending only a half or a quarter of his time on the project. Also in that letter he said that, bit by bit and with the consent of the other staff, he had adapted his hours to the changing pattern of work at the centre: in five years the number of experts and associate experts on the

project team had risen from two to "ten or so", all using the same telephone and fax and photocopying machines in his own office and, for a while, the services of the same secretary. In support of the charges the defendant cites the letter from the head of the institute. But that letter, too, relies on the attendance sheets as evidence of a "discrepancy between the official timetable at the Centre and the times of [the complainant's] comings and goings". The complainant offers evidence in rebuttal of the attendance sheets. Lastly, there is no proof that the Senegalese counterpart authority actually did make oral criticisms of him.

14. The statements by the Representative and by the complainant are at odds and there is no irrefutable evidence before the Tribunal. The conclusion is that what was needed was a proper inquiry to see whether on the strength of reliable evidence the charges against him stood up.

15. What is more, the FAO's treatment of him looks like punishment for conduct it disapproved of and for low output. So there should first have been due disciplinary process affording him full safeguards. Indeed the Representative acknowledged by implication in the memorandum which prompted the impugned decision that disciplinary proceedings were the right course: as was said in 3 above, he suggested waiving them on the grounds that that "might lead to more drastic action". The Appeals Committee thought such waiver a pity on the grounds that "disciplinary proceedings would no doubt have served to sort out this issue".

16. The FAO argues that because the project was soon to be wound up the complainant could not expect renewal of his appointment: as regional coordinator he knew full well that the second phase would end in 1995 and Belgian financing of the third one was far from sure. As he has pointed out, however, "the order of events shows that stripping him of his duties as coordinator on 31 May 1995 had nothing to do with the start of the third phase, which, as the Organization concedes, came sixteen months later".

17. The conclusion is that without the safeguards of due process he suffered action which amounted to a sanction. As the Appeals Committee said in its report, the decision had harmed his dignity and good name and had, on the Representative's own admission, given him a "nasty shock".

The Committee made severely critical comments about the Representative's behaviour and felt that the case had proved damaging to the Organization's reputation too.

18. Because there was no due process, because the complainant's standing and good name were harmed and because he had served the Organization long and well the Director-General's decision of 15 April 1997 must be set aside and the complainant awarded damages. The amount is set at 75,000 United States dollars. His other claims are dismissed.

DECISION

For the above reasons,

1. The Director-General's decision of 15 April 1997 is set aside.

2. The FAO shall pay the complainant 75,000 United States dollars in damages.

3. It shall pay him 20,000 French francs in costs.

4. His other claims are dismissed.

In witness of this judgment, adopted on 13 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

A.B. GARDNER

EIGHTY-SIXTH SESSION

***In re* Weiss (No. 2)**
(Application for execution)

Judgment 1797

THE ADMINISTRATIVE TRIBUNAL,

Considering the application filed by Mr. Gian Mario Weiss on 30 April 1998 for the execution of Judgment 1632, the reply of the World Health Organization (WHO) of 16 July, the complainant's rejoinder of 26 August, the Organization's surrejoinder of 19 October, the complainant's further brief of 30 October and the Organization's comments thereon of 12 November 1998;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS

1. This is an application for the execution of Judgment 1632. The relief that it granted to the complainant was either reinstatement or an award of damages. According to 23, if the Organization reinstated him it was to pay the salary, allowances and benefits due under his contract less any indemnity or earnings he might have received or would receive until either his appointment was terminated on completion of the reduction-in-force procedure or he was redeployed under that procedure. According to the alternative option set out in 24 the Organization was to pay him damages equivalent to the same amounts, but without actually reinstating him, and carry out the procedure under the same conditions. He was also awarded interest at the rate of 8 per cent a year on the sums due and 2,000 Swiss francs in costs.

2. He now seeks the following relief:

(1) reinstatement as the "first step of the execution";

(2) recognition of "excessive and unjustified delay" in carrying out the reduction-in-force procedure, "resulting practically in a renewed termination, without a prior reinstatement";

(3) compensation for "the inordinate delay" in execution;

(4) "prompt payment" of arrears, including the WHO's contributions for him to the United Nations Joint Staff Pension Fund; and

(5) "reconsideration by the WHO Management of a new appointment for ... reinstatement in a multi-programme user-oriented service".

3. Judgment 1632 was delivered on 10 July 1997. The Director of the Division of Personnel wrote to the complainant on 30 July to say that "immediate action" was "being taken" to pay the award of costs but that there were "a number of issues which must be examined and determined before any further actions are taken". The Director wrote again at length on 19 November 1997 to say that he would be "included in a reduction-in-force (RIF) exercise, in accordance with WHO Manual II.9.280-375"; "in carrying out the RIF procedure, offers of reassignment are made first, where possible, in accordance with ... II.9.290"; he would "soon receive post descriptions or copies of vacancy notices for all posts available for reassignment" at his grade "and below" and should then "indicate, in order of preference", the posts he wanted to be considered for; if unsuccessful at that stage, he would "take part in a competition" as a "candidate for retention (WHO Manual II.9.300)"; and, if successful, he would be "reinstated against an unassigned post", as from 1 June 1995 and until the date of reassignment to his new post, on "full pay status" at the grade and step he would have reached had he stayed with his old unit, the Programme on Substance Abuse, beyond May 1995. The Director went on to explain that, if altogether unsuccessful in the procedure, he would be paid the damages due as from 1 June 1995 – net basic salary and post adjustment, dependent child and language allowances – less any occupational earnings;

but the damages would not "entail reinstatement" in the Pension Fund or in health and accident insurance.

4. By a letter of 23 December 1997 the Director sent him "vacancy notices and/or post descriptions", asked him to state in order of preference the posts he was interested in, and again told him that, if unsuccessful, he would "take part in a competition" as a "candidate for retention (WHO Manual II 9.300)".

5. By a letter of 20 March 1998 the Director told him that he would get no offer of reassignment but had become a "candidate for retention in the competition phase of the Reduction-in-Force exercise". The Director wrote again on 30 March to say that, having got no offer of a post in the same occupational group as his old post, he could ask the Reduction-in-Force Committee for leave to "compete for posts in a different occupational group", but would be considered only if "obviously well-suited for work" in that group. He might compete for posts in more than one group, but must then list the groups in order of preference. It was, said the Director, "essential" for him to know the complainant's wishes by 2 April. The deadline was extended to 6 April and by a fax letter of that date the complainant asked for leave to compete for posts in four other occupational groups.

6. The Director sent another letter on 16 April 1998. The Reduction-in-Force Committee had, he said, found the complainant "obviously well-suited" for work in only one of those groups; but, having applied the procedure set out in Manual paragraphs II.9.330 to 350, the Committee had found him "unsuited for posts" available in that group at the grade he had held in his old unit at 31 May 1995 and there was none at one grade lower in that group; for him the whole exercise was over and, not being reinstated, he would get the award of damages instead.

Claim (1)

7. The complainant argues that the facts of his case do not warrant applying to him the alternative option the Tribunal offered in Judgment 1632 under 24. He says that posts in the Programme on Substance Abuse did not

– to quote the term in 24 – suffer "decimation". To his mind the sequence that the judgment required was, first, his reinstatement and payment of the sums due under 23, then the application of the reduction-in-force procedure. Instead the Organization began by applying the procedure. It failed to explain which option it was taking and not until he got its letter of 16 April 1998 did he realise it was limiting execution of the judgment to the option in 24, i.e. the award of damages. He objects to inordinate delay in execution and to the shortness of the deadline he was given for identifying other occupational groups.

8. The complainant may not properly contend that what the judgment said in 24 does not apply to him: it referred to the decimation of posts, not in his old unit, but in the WHO at large.

9. Nor did the judgment require the Organization to begin by reinstating him. It had merely to choose between two options, reinstatement and payment of damages, and also to apply the reduction-in-force procedure to him. Since it did not choose to reinstate him immediately, it made a reasonable decision in preferring to hold the reduction-in-force exercise first and then, according to the outcome, either reinstating him, if he was successful, as from the date of termination or paying him the award of damages. The Director's letter of 19 November 1997 explained as much to him, and in terms that were quite clear.

Claims (2) and (3)

10. In answer to his plea of inordinate delay the Organization points out that there were sixty-one serving and former staff members covered by the reduction-in-force exercise. They included the eight on whose cases the Tribunal delivered judgment on the same day as on the present complainant's, as well as the eleven interveners and "late claimants". The Organization sets out the chronology of the whole reduction-in-force procedure. It started with the setting up of a "task force" in July 1997. It included the sending of letters to former staff of the Global Programme on AIDS (GPA) all over the world about the Tribunal's rulings. The reassignment phase of the exercise began on 23 December 1997 and was not completed for General Service category staff until 27 February 1998 and for

Professional staff not until 6 April 1998. The competition phase for General Service staff ran from 19 February until 21 April 1998 and for Professional staff from 23 March to 5 May 1998. The deadline of two days that the complainant was given on 30 March 1998 was extended by four days. As early as 16 April 1998 the Director of Personnel wrote to tell him he had been unsuccessful and on 15 June sent him the detailed reckoning of the amount due to him in damages. On 13 July 1998 the amount so calculated – though he had objected to the reckoning of his step increments – was paid into his account, together with interest.

11. The Tribunal is satisfied on the evidence that the Organization acted with reasonable speed in carrying out the large exercise that Judgment 1632 and the related ones called for. Although the two days the complainant was allowed in which to answer the Director's letter of 30 March 1998 were too short, they were extended to six, and the complainant did manage to reply in time. Besides, the Organization has compensated him for the time it took to carry out the reduction-in-force procedure by paying him interest on the sums due up to the date of payment. The conclusion is that it was not guilty of any inordinate delay and that no further compensation is due on that score.

Claim (4)

12. The Organization pleads that it is under no duty to pay contributions for him to the Pension Fund or to the staff health insurance plan and would have had such duty only if he had been reinstated, participation in the Fund and the plan being restricted to staff.

13. The Tribunal ruled on a similar issue in Judgment 1338 (*in re* Manaktala No. 3), in which it held that its award in Judgment 1133 of damages equivalent to "the amount of the salary, allowances and other entitlements [the complainant] would have received" had not required reinstatement in the Pension Fund or health insurance. Though the language of Judgment 1632 was not the same, the intent was. The Tribunal did not order the Organization to reinstate the complainant in the Pension Fund or health insurance plan since it did not reinstate him in employment. His claim under this head too therefore fails.

Claim (5)

14. There are no grounds for ordering the WHO to consider granting him a new appointment. The relief he is entitled to was set out in Judgment 1632: neither more nor less.

The reckoning of damages

15. Since 30 April 1998, when the complainant filed this application, there has been constant dispute between the parties about the reckoning of damages. By a letter of 12 July 1998 to the Director of Personnel the complainant objected to the "table of calculations" the Director had sent him by letter of 15 June 1998. By a letter of 11 September 1998, which the Organization appends to its surrejoinder, the Administration admitted to an "oversight" and enclosed a "revised calculation sheet". In its surrejoinder the Organization says:

> "The complainant accepted his final payment on 12 October 1998, without any dispute as to the accuracy of the calculation."

In a further statement invited by the Tribunal the complainant disputes the date of payment and denies accepting any payment in final execution of Judgment 1632.

16. Although the matter of reckoning the damages is therefore not closed, the Tribunal has ruled on the issues raised in this complaint. But its ruling does not prevent the complainant from challenging the reckoning.

DECISION

For the above reasons,

The application is dismissed.

In witness of this judgment, adopted on 13 November 1998, Mr. Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation, the French text alone being authoritative.

EIGHTY-SIXTH SESSION

In re **Ashurst, Berthet, Bosshard and Tuli**

Judgment 1798

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mrs. Jennifer Lilian Ashurst, Mrs. Carmen Berthet, Mrs. Agnès Bosshard, and Mrs. Mary Ann Tuli against the European Molecular Biology Laboratory (EMBL) on 6 December 1996 and corrected on 18 February 1997, the EMBL's replies of 27 May 1997, the complainants' rejoinders of 26 March 1998 and the Laboratory's surrejoinders of 2 July 1998;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. On 9 December 1981 the Council of the Laboratory decided as from 1 January 1982 to take what is known as the system of the Coordinated Organizations* as the standard of reference for adjusting the pay of its own staff: see Judgment 1682 (*in re* Argos and others) of 29 January 1998.

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* They include the North Atlantic Treaty Organization (NATO), the Organization for Economic Cooperation and Development (OECD), the Council of Europe (CE), the European Space Agency (ESA), the Western European Union (WEU) and the European Centre for Medium-Range Weather Forecasts (ECMWF).

In 1995 a Working Group on Pay drafted a resolution in favour of replacing the decision of 9 December 1981 – though keeping a reference to the Coordinated Organizations – and amending the Staff Regulations accordingly. The Finance Committee recommended the resolution and on 20 December 1995 the Council adopted it.

On 4 March 1996 the Administrative Director submitted to the Council two new versions of Article R 4 1.01 of the Regulations. One came from the Standing Advisory Committee, the other from management without referral to that Committee. The Administrative Director explained that, when looking at the first version, the Committee had been told by the Staff Association that it had opposed the Council's resolution in December 1995 and could not agree to the amendments. Management had then drafted a simpler text and, instead of consulting the Committee again, had sent it to the chairman of the Association, who had merely repeated its hostility to the resolution. On 4 July 1996 the Council adopted the following, simplified, text of Article R 4 1.01:

> "Basic salary scales and allowances shall be reviewed and determined in accordance with the decisions taken by Council as laid down in Annex R.A.1."

Annex R.A.1 reads:

> "The Council,
>
> - stressing the need for maintaining its sovereign power of decision on remuneration policy of the organisation which excludes an automatic application of any particular method of adjusting pay;
> - stating that the reference to the relevant decisions of the Coordinated Organizations in accordance with the decision taken by Council on December 9, 1981 has never constituted a legal obligation to apply such decisions in full or at all;
> - herewith replacing its decision of December 9, 1981,
>
> decides that:
>
> 1. When reviewing basic salary scales and allowances for staff based in Germany, the Council shall use as an orientation the index calculated according to the procedure of the Coordinated Organizations with respect to adjustment of the basic salary scales of the Coordinated Organizations in Germany.
> 2. When assessing whether or to what extent this index shall be applied as the actual salary adjustment. Council shall take into account relevant criteria including the economic, budgetary and social

> situation prevailing both in the Organization and in the Member States.
>
> 3. The basic salary scales and the allowances for staff based outside Germany will be determined so as to preserve purchasing power parities calculated according to the procedure of the Coordinated Organizations.
> 4. The basic salary scales and the allowances for staff shall require the approval of a formal Council resolution."

By staff circular of 25 July 1996 the Administrative Director announced that the Council had adopted the amendments and put off adjusting pay for 1996 pending a ruling by the Tribunal on recent pay policy – it came in Judgment 1682 - but that the adjustment would be backdated to July 1996.

On 8 August Mrs. Ashurst, the vice-chairwoman of the Association, sent the Director-General individual appeals from herself, the other complainants and 27 other staff members. They each challenged the "first application to my individual case" of the Council's decision in their pay slips of 15 July and asked the Director-General to quash the impugned decisions or, failing that, allow straight appeal to the Tribunal. The Administrative Director answered her the very same day that in his view the pay slips were not final decisions, the adjustment having been held over.

By a letter of 11 September 1996 the Director-General pointed out to her that, even if he waived the internal appeal, there was no final decision challengeable before the Tribunal. That is the decision the complainants are impugning.

B. The complainants submit that their complaints are receivable. Although the Council put off deciding on pay for 1996, their pay slips for July of that year were the first individual applications of the amendments of 4 July to the rules on adjustment. Citing Judgment 1330 (*in re* Bangasser and others) of 31 January 1994, for one, they contend that, for the suit to be receivable, "all that a complainant need show is that the decision under challenge may impair the rights and safeguards" of staff.

On the merits they argue that the amendments to Article R 4 1.01 were in breach of the procedure in Article R 7 1.01 because the Standing Advisory Committee had not been consulted. By taking a standard of reference that is not binding the Council is "discarding the whole idea of adjustment" and showing bad faith. It has also repealed the ban on downward adjustment. The impugned decision was in breach of such general principles of the international civil service as stability in law and Noblemaire. Mrs. Ashurst and Mrs. Bosshard contend that the Laboratory has discriminated, too, against the staff serving in Germany. And all the complainants plead breach of their acquired rights in that the impugned decision precludes adjustment of pay to the cost of living.

They seek the quashing of it and an award of costs.

C. The Laboratory replies that the complaints are irreceivable because there is no final decision, its Council having postponed deciding on pay for 1996. So the complainants can show no injury.

In subsidiary argument it pleads that the amendments adopted by its Council made no change of substance in the text put to the Standing Advisory Committee, which there was therefore no need to bring in again. The chairman of the Staff Association himself saw no point in its meeting again and the members of the Association on the Committee had had the opportunity of raising objections at the Council's session of July 1996. The Laboratory says that "some leeway is needed to make allowance for change in [its] financial and budgetary situation". There was no breach of any general principle of law. The new rules shelter staff from arbitrary decisions. There is "no general rule that an organisation must adjust pay to the cost of living". Such adjustment, and a ban on downward adjustment, are not acquired rights. As for Noblemaire, "member States appear not to acknowledge any obligation to pay the highest rates to international civil servants". The new rules do not discriminate against staff in Germany.

D. In their rejoinders the complainants maintain that their complaints are receivable because they are challenging final individual decisions which cause them injury. Citing Judgment 1682, they contend that until July 1996 the Laboratory's practice was in breach of its own rules. Since it is passing off the new rules not as amendments but as an interpretation of the system in force before 4 July 1996, that interpretation too is unlawful. It seems to think that budgeting must prevail over the rules on pay, though the Tribunal has condemned the notion.

Any amendment should have gone to a plenary meeting of the Standing Advisory Committee, and merely getting the opinion of the chairman of the Staff Association was not proper consultation. The purpose of the new rules was not just to stop rises in pay but reduce it by "applying negative rates".

E. In its surrejoinders the Laboratory observes that the Council decided on 17 December 1996 not to adjust pay for 1996. It maintains that the complaints are irreceivable. The complainants could have challenged the individual decisions applying the Council's decision of 17 December 1996, as other staff members have done. Lastly, the complainants broke the staff rules by failing to submit to the Director-General in the internal proceedings the pleas they have put to the Tribunal.

CONSIDERATIONS

1. The complainants are employees of the European Molecular Biology Laboratory and are challenging their pay slips for July 1996. Apart from a plea by two of them about the case of staff serving in Germany the grounds of appeal are the same. Since the four complaints raise the same issues the Tribunal joins them.

2. The pay of the Laboratory's staff is ordinarily adjusted every year in accordance with the Staff Regulations. Until 1996 Article R 4 1.01 of the Regulations said: "The Council shall use as a guide the relevant decisions of the Coordinated Organizations". Judgment 1682 (*in re* Argos and others) of 29 January 1998 held that the Laboratory had broken that rule in setting pay for 1995. On 4 July 1996 the Council of the Laboratory amended the Staff Regulations. According to the new text of Article R 4 1.01 basic salary scales and allowances were to be reviewed and set "in accordance with the decisions taken by Council as laid down in Annex R.A.1". The Annex says that in reviewing the pay of the staff in Germany the Council "shall use as an orientation the index calculated according to the procedure of the Coordinated Organizations"; and "when assessing whether or to what extent this index shall be applied as the actual salary adjustment, Council shall take into account relevant criteria including the economic, budgetary and social situation prevailing both in the Organization and in the Member States". As

for staff outside Germany, the Annex prescribes setting their pay "so as to preserve purchasing power parities calculated according to the procedure of the Coordinated Organizations".

3. A staff circular of 25 July 1996 from the Administrative Director said that the Council had amended the rules on pay and was holding over any adjustment in pay for 1996 until the Tribunal had heard the then pending complaints about pay for 1995.

4. The complainants found on getting their pay slips for July 1996 that there was no adjustment. They lodged internal appeals. After correspondence the Director-General rejected them on 11 September 1996 on the grounds that pending a ruling from the Tribunal the Laboratory had taken no final decision on pay for 1996. But he waived internal appeal and gave the complainants leave to come straight to the Tribunal. They have.

5. The Laboratory replies that their complaints are irreceivable: what they are impugning are their pay slips for July 1996, which are not final decisions. They rejoin that their pay slips are decisions to their detriment and the first individual applications of the Council's new rules on adjustment.

6. A strong line of precedent has it that pay slips are individual decisions which may be challenged before the Tribunal. Indeed the Laboratory concedes in its surrejoinder that a pay slip is a final decision within the meaning of Article VII of the Tribunal's Statute and that the complainants "do have the right to appeal against it and so incidentally challenge the rules and policy decisions which afford the basis for individual decisions on pay". Even though the Council has reserved its right to alter pay for July 1996 later, and retroactively, the impugned decisions do show a cause of action.

7. Though receivable, the suit must fail. The complainants are arguing that the impugned decisions are the first applications of the new R 4 1.01 and Annex R.A.1; that the new rules are unlawful for want of the referral to the Standing Advisory Committee required by Article R 7 1.01, for a departure from general canons that lets in arbitrariness, and for breach

of acquired rights. Those pleas cannot succeed. It is common ground that the Council postponed applying the new rules pending a decision by the Tribunal on pay for 1995. Though that implied a provisional decision not to adjust pay, the reasons for the postponement and for retroactive review are quite understandable. In itself the decision does not impair the rights of staff. Whether the new rules are lawful is an issue that must wait: the Tribunal may entertain it in determining whether the Council's final decision on pay for 1996 is lawful. But the pleas put forward in challenge to the Director-General's decision of 11 September 1996 must fail because at that time the new rules – the only ones the complainants are objecting to – had not yet been applied.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 6 November 1998, Mr. Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

MICHEL GENTOT MELLA CARROLL JAMES K. HUGESSEN

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-SIXTH SESSION

***In re* Masens (No. 3)**
(Application for review)

Judgment 1799

THE ADMINISTRATIVE TRIBUNAL,

Considering the application filed by Miss Liana Yvonne Masens on 12 August 1998 for review of Judgment 1751;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 7 of its Rules;

Having examined the written submissions;

CONSIDERATIONS

1. The Director-General of the United Nations Industrial Development Organization (UNIDO) put the complainant on special leave; Judgment 1700 of 29 January 1998 dismissed as irreceivable her complaint against that decision; and she has already applied to have that judgment reviewed. Judgment 1751 of 9 July 1998 dismissed that application on the grounds that she had failed to show any mistake of fact warranting review.

2. In support of her present application for review of Judgment 1751 she cites "new facts". They are nothing of the kind. One is the opinion of a lawyer whom she consulted on 28 July 1995; the second is a brief sent to the Tribunal on 15 October 1997 but disallowed; and others are the report of the Joint Appeals Board of UNIDO on her case and the "terror" which

she says the Organization put her through between 1983 and 1993. Those are not matters that warrant review of the Tribunal's judgment, which is final.

3. Her second application for review being clearly irreceivable, the Tribunal dismisses it under the summary procedure in Article 7 of its Rules.

DECISION

For the above reasons,

The application is dismissed.

In witness of this judgment, adopted on 18 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

MICHEL GENTOT JULIO BARBERIS JEAN-FRANÇOIS EGLI

A.B. GARDNER

Registry's translation, the French text alone being authoritative.

EIGHTY-SIXTH SESSION

***In re* Baron, Damond (No. 4), Di Palma (No. 4), Dondenne (No. 4), Hutchins, Kopp and Vitte**

Judgment 1800

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr. Jean-Luc Baron, Mr. Keith Hutchins, Mr. Norbert Kopp and Miss Claire Vitte against the World Intellectual Property Organization (WIPO) on 9 June 1997 and the fourth complaints filed against the same Organization at the same date by Mrs. Andrée Damond, Mr. Salvatore Di Palma and Mr. Bernard Dondenne and corrected on 22 July, WIPO's single reply of 19 September, the complainants' rejoinder of 6 October, the observations filed by the International Civil Service Commission (ICSC) on 26 November 1997, the complainants' comments thereon of 6 January 1998, the Organization's letter of 9 February informing the Registrar of the Tribunal that it did not wish to file a surrejoinder, the Commission's further brief of 13 February and the Organization's letter of 19 March informing the Registrar that it had no comments to make on that further brief;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 13, paragraph 3, of its Rules;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. As was explained in Judgment 1776 (*in re* Damond No. 3 and others), under A, post adjustment allowance forms part of the pay of officials in the Professional and higher categories of staff of organisations that belong, as WIPO does, to the common system of the United Nations. Their pay is determined in part according to what is known as the Noblemaire principle, which Judgment 825 (*in re* Beattie and Sheeran) explained under 1 to 5. The post adjustment index has four main components: "in-area" expenditures, "rental/housing" costs, "out-of-area" expenditures and contributions to the United Nations Joint Staff Pension Fund. The International Civil Service Commission explained in a brochure it put out in May 1994 about post adjustment that out-of-area expenditures are those which, "although incurred while the staff member is at the duty station, are disbursed outside the country, generally in another currency".

At its 42nd Session, in July and August 1995, the Commission decided for the purpose of reckoning the post adjustment index to add to out-of-area expenditure a sum corresponding to 5 per cent of net basic salary. The Commission said that the purpose was to take account of financial commitments other than expenditure on consumption, such as investments and savings, which the staff entered into outside the duty station. The change was to take effect at 1 January 1996. Like action had been taken in 1986 but – so said the Commission – had been suspended *de facto* by the introduction in 1990 of the system of "bands" which is described in Judgment 1776.

The Commission explains in its booklet that "a place-to-place survey is carried out at least once every four years in all locations where UN system staff are stationed", the purpose being to garner the basic data for working out the post adjustment index. That allows comparison of living costs between New York, the "base of the system", and a particular duty station. The survey to be done in New York in 1994 was held over to mid-1995, and so the survey in Geneva took place in November 1995. The Commission approved the findings of those surveys at its 43rd Session in April and May 1996 and decided that the one for Geneva should count in setting the post adjustment for that duty station as from 1 June 1996.

The effect of adding 5 per cent of basic salary to out-of-area expenditure and of the findings of the place-to-place survey in 1995 was to lower the post adjustment index by 5.1 per cent and to "freeze" pay in Geneva.

WIPO employs the complainants at its headquarters in Geneva. In the working week that started on 22 July 1996 it sent them their pay slips for that month. By a letter of 2 September 1996 they asked the Director-General to review his decision to maintain for July the post adjustment index that had applied in June. They argued that according to what is known as the "twelve-month rule" a rise in the cost of living warranted a rise in pay. Having got no answer, they filed an internal appeal on 25 November 1996. On 7 February 1997 the Appeal Board submitted a single report on the appeal and on the identical one brought against the International Union for the Protection of New Varieties of Plants by Mr. André Heitz, who was also stationed in Geneva. Mr. Heitz had put his appeal to the Director-General of WIPO in his capacity as Secretary-General of the Union: see Judgment 1801, also delivered this day. The Appeal Board felt unable to comment on most of the complainants' objections because it did not know how the Commission had come to make its recommendation. It saw no point in trying to find out because the Commission had only recently declined to explain: see Judgment 1776. It recommended upholding the decision "so as to allow prompt referral [to the Tribunal] and so objective review of the lawfulness of the Commission's recommendations". By memoranda of 4 March 1997, the decisions impugned, the Director-General told the complainants that he was endorsing the Board's recommendations.

B. The complainants submit that it was unlawful to incorporate the equivalent of 5 per cent of basic salary into out-of-area expenditure.

Their first plea is abuse of authority. In their view the Commission made no objective assessment of the purchasing power of staff pay at various duty stations. It obviously prejudged the matter. It so applied its "methodology" as to bring about the findings its members wanted. It did things in a rush, did not bother about technical justification, "belittled" the effects of the new scales and broke with custom by failing to report to the General Assembly of the United Nations.

Secondly, there was misuse of authority. The Commission's true purpose was to save money, not to iron out disparities between duty stations. Its decision and two more recent ones mean a fall of nearly 6 per cent in the post adjustment index for Geneva whereas the index for New York, where it has its secretariat, has hardly budged.

Thirdly, the complainants contend that the decision was retroactive because the 5 per cent cut was added to the figure of out-of-area expenditure for May 1990.

They have objections, too, to the place-to-place survey.

First, inasmuch as the index derived from the latest findings is adjusted every month, they are wary of the 5.1 per cent difference between the "existing" index – the one adjusted each month – and the new one. By their reckoning the purchasing power of staff pay in Geneva has dropped by some 25 to 30 per cent since 1975.

Secondly, there was a procedural flaw. It was the Commission's own secretariat that got the data, not, as its booklet on post adjustment says, "an independent person". Its secretariat was too small to muster the dozen properly qualified people – six teams of two – needed to do the job of "pricing agents" in New York. The secretariat had a direct interest, too, in inflating prices in New York so as to play down the cost of living at other duty stations. General Assembly and Commission alike were pushing to get expenditure on staff down elsewhere than in New York.

Thirdly, the complainants see another procedural flaw in the secrecy wrapping the surveys. Deadlines for sending off Commission papers were missed; there were differences between New York and Geneva in the manner of gathering data; and the representatives of management and the members of the Advisory Committee on Post Adjustment Questions (ACPAQ) were unable to check the data for New York. WIPO pointed out to the Chairman of the Commission that the procedure had not allowed it, as the Tribunal's rulings required, to check the lawfulness of the post adjustment index.

The complainants charge the Commission with interference and bad faith.

They have a subsidiary plea that the Chairman failed to make known the effect given to the findings of the place-to-place survey, and the Director-General of WIPO to inform the staff.

The complainants claim the quashing of the Director-General's decision to apply the post adjustment index reckoned by the Commission and to pay interest at the rate of 8 per cent a year on the sums due. They further claim 3,000 Swiss francs each in costs.

C. As to the addition of 5 per cent of basic salary to out-of-area expenditure, WIPO explains in its reply that for want of information from the Commission, and because the staff had not challenged a similar decision taken in 1986, it could not refuse to put the Commission's decision into effect.

As for the findings of the place-to-place survey, the defendant says that it tried to do what precedent requires, but on the strength of the information vouchsafed by the Commission it could challenge neither methodology nor findings.

D. The complainants rejoin that the failure of the staff to challenge a decision back in 1986 does not make it, let alone a later one, quite lawful. Besides, the system of adjustment and the whole context have since changed.

They point out that, like WIPO, they lack the information they need to prove beyond doubt what they are saying, and that the Organization itself has not denied that the findings of the place-to-place survey are suspect.

E. The Commission admits to an "oversight" in failing to incorporate the 5 per cent of basic salary in out-of-area expenditure after the old system of "bands" had been dropped. The upshot was that the index was too high at duty stations where the cost of living was high and too low where it was low. The purpose in adding the 5 per cent was to restore parity of purchasing power throughout the common system. The Commission explains that its Statute empowers it to amend the system of adjustment without referral to the General Assembly. Its decision was not retroactive but took effect only for the future, though based on the findings of the place-to-place survey done in 1990.

As for the survey, its own staff were fully qualified to get the data, have always taken part in surveys, and work independently and evenhandedly. The post adjustment index for New York hinged on the consumer price index provided by the Government of the United States, not on the findings of the survey, which served merely as a standard of comparison for other duty stations. The Commission's secretariat stood to gain nothing from exaggerating prices in New York. Its booklet is not binding in law. It denies the charges of interference and bad faith and points out that the whole system calls for some secrecy. It argues that the decision to apply the findings of the survey was notified to organisations and staff by a circular signed by its Chairman.

F. In comments on the Commission's brief the complainants challenge the explanations it offers. They maintain that it made mistakes of fact. It erred, for example, in taking the view that the system of bands had superseded the decision to add 5 per cent of basic salary to out-of-area expenditure and that that figure had to be incorporated when the system of bands was dropped. They are "flabbergasted" at the Commission's imagining it had no duty to inform the General Assembly. Its reckoning of the new indices is wrong.

It is wrong, too, in making out that its booklet is not binding. That is just the sort of wile that shows up its bad faith. The complainants press their objections to the gathering of data by its own secretariat. The procedure ran counter to its own account of the system of adjustment, and custom, however long, does not make the procedure lawful. The Commission went back on decisions it had taken in June 1995 to see that organisations and staff were given the data and calculations. It is still refusing that information. Sending organisations and staff circulars does not meet the requirement in its Statute that it publish its decisions.

G. In a further brief the Commission presses its pleas. It contends that it got the calculations right. The organisations and staff could, at the preparatory meetings about the survey of 1995, have objected to having its own secretariat get the data. The Advisory Committee on Post Adjustment Questions was satisfied with the findings.

CONSIDERATIONS

1. The complainants belong to the Professional or higher categories of staff of the World Intellectual Property Organization. They are challenging their pay slips for July 1996. Those pay slips showed no

increase in pay though the cost of living at Geneva had risen in the preceding twelve months. The figure of the post adjustment index – 91.7 – applied to their pay was the same as the index used in June 1996. The reason was that the International Civil Service Commission (ICSC) had made new rules for working out the index. For one thing, it had decided as from November 1995 to use an "actual" weighting of the "out-of-area" component of expenditure that counted in reckoning the index. For another, it included in that component as from January 1996 five per cent of basic salary, a figure intended to reflect amounts that did not come under expenditure on consumer goods. As from June 1996 it put into effect the findings of the place-to-place survey it had carried out in the second half of 1995.

2. Judgment 1776 (*in re* Damond No. 3 and others) dismissed complaints from staff of WIPO challenging the application of an actual weighting of out-of-area expenditure in determining the post adjustment index as from November 1995. It said:

> "Post adjustment has two purposes. One is to ensure that the pay of all staff of the common system of the United Nations, whatever their duty station may be, has the same purchasing power in local currency as pay in New York, which serves as the basis for the whole system. The other purpose is to keep purchasing power broadly steady despite changes in the cost of living at the duty station."

3. The Commission published a booklet in May 1994 about the system of adjustment. It explains that for the purpose of determining the index comparisons are made from time to time by means of place-to-place surveys between the base city, New York, and other duty stations. The post adjustment index determines the amount to be paid to staff in the Professional and higher categories. It includes several weighted items such as "in-area" expenditure, mainly accounted for by consumer goods in the country of the duty station; "rental/housing" expenses, which cover the cost of lodging and kindred charges; "out-of-area" expenditure, such as a staff member stationed in one country incurs in another, usually in a currency other than the local one; and contributions to the United Nations Joint Staff Pension Fund. What the complainants are objecting to is that their pay for July 1996 was held down or, more properly, failed to go up, because of the

Commission's method of reckoning out-of-area expenditure and the findings of the survey done in 1995, which, in their submission, is flawed in many respects.

4. The case went to the Appeal Board of WIPO. The Board recommended upholding the impugned decisions, but pointed out that it was unable to confirm or reject the complainants' objections "because it did not know how the Commission had come to make its recommendations, which were indirectly under challenge". The sole purpose of its recommendation was to "allow prompt referral" to the Tribunal.

5. So the case has come to the Tribunal, and there is no difficulty over receivability. In its reply the Organization contends that it did what was required of it to put the Commission's decisions into effect and that the information it got from the Commission did not allow it to question the methodology or the findings of the survey. Actually it has simply left the Commission to defend its own case. What is at stake – the pay of its own staff – matters: yet the Organization is just not acting as any defendant ought.

6. The complainants put forward three pleas in support of their challenge to the inclusion of the equivalent of 5 per cent of basic pay in out-of-area expenditure in reckoning the index. First, the decision the Commission took on that score at its 42nd Session had no objective basis, but was rushed through on the strength of postulates calculated to bear out a foregone conclusion. The Commission's own working party had not recommended it, and the Commission never reported it to the General Assembly of the United Nations. Secondly, the sole purpose of that decision and of the corollary ones was to bring down the index for Geneva and so save huge sums on staffing in expensive cities other than New York. Thirdly, the Commission's methodology broke the rule against retroactivity because it meant adding the equivalent of 5 per cent of basic salary to the figure of out-of-area expenditure taken for May 1990.

7. The pleas fail. For one thing, it cannot be seriously argued that the Commission acted – to quote the complainants – "in haste, en passant". Some of the money paid to staff is not spent in the area of the duty station,

or is not spent at all. How was that to be taken into account in reckoning the index? For over ten years thorough discussion had been going on about that question in the Commission itself and in the Advisory Committee on Post Adjustment Questions (ACPAQ). Sometimes the debate drifted. In May 1995 the Commission decided to reckon out-of-area expenditure by applying an "actual coefficient" instead of the fixed one peculiar to the old system of splitting duty stations into "bands". That obviously meant taking a figure corresponding to moneys not spent at the duty station. The expedient that in the end went through was to take instead the round figure of 5 per cent of basic salary that had been used in 1986-89. It seems reasonable. In any event it shows no mistake of fact or any obvious misappraisal of the evidence. It may have incurred criticism, and discussion in the ACPAQ's working party did suggest more than one approach. But the Commission had to take the decision, and promptly. That was because discussion at its 41st Session had brought about changes in the manner of reckoning out-of-area expenditure, and there was a risk of disparities in pay between duty stations if the index discounted unspent moneys. What the Commission calls "equitable treatment of staff at all duty stations" is an aim not inherently at odds with that of the post adjustment. In acting as it did the Commission was exercising its authority under Article 11 of its Statute. Keeping the General Assembly abreast of action it has taken is desirable - and it ordinarily does so - but even if it does not the omission is not a fatal flaw.

8. The complainants' second plea is that the sole purpose of the change in the rules on the index was to save money. The Tribunal need only quote the reply it gave to that argument in Judgment 1776:

> "If the new method is lawful the fact that applying it saves member States money cannot in itself be a flaw."

And the evidence suggests no misuse of authority by the Commission, which, against the odds, tries to find from time to time objective criteria for reckoning post adjustment throughout the common system.

9. The third plea - breach of the rule against retroactivity - was rejected in Judgment 1776. It fails again here. For statistical reasons the figures used to reckon the index in 1990 had to be recalculated, and it was done by adding the equivalent of 5 per cent of basic salary to the "out-of-

area" component. But taking that fictitious figure was necessary so as to draw comparisons for the purpose of reckoning the index in 1996. There was no flaw in the method just because the figure taken for that purpose was 5 per cent of basic salary for January 1996. The long and the short of it is that the new index had no retroactive effect on pay.

10. The complainants raise objections to the way in which the survey was done in 1995. In their submission the "pricing agents" were neither independent nor competent; both in New York and Geneva the whole process was secretive; and the data were not notified in time to the organisations and to the members of the ACPAQ. To their mind those flaws were deliberate and betray the Commission's bad faith. Furthermore, its Chairman failed to notify the use made of the findings to management or staff representatives.

11. The first argument rests on the text of the Commission's booklet about post adjustment. Paragraph 1.10.1 says that a "pricing agent" is an "independent person appointed by ICSC to collect prices in retail outlets patronized by the staff", who must, to boot, "be sufficiently experienced and qualified to recognise local shopping conditions as they relate to staff at the duty station, and conversant with the specification of items on the pricing list". The complainants say that here the agents were just the Commission's own people and that, its secretariat being small, they could not have been properly qualified. Nor were they properly objective, the Commission's aim being to lower costs at duty stations other than New York.

12. There is no evidence to bear out the charges. The Commission's booklet is not a binding text, and in any event the requirement of independence does not disqualify its own staff provided they act objectively. The charge that they were unfit for the task rests on no specific allegation of fact but on the mere supposition that it could not muster among its own staff people qualified to get the data. The evidence bears out neither that apprehension nor the much graver charge of coercion to come up with figures that would exaggerate the cost of living in New York.

13. The findings of the survey were not conveyed to the agencies in time to allow any real scrutiny. The timetable shows as much, and indeed the defendant said so in strong language in a letter of 21 October 1996 to the Chairman of the Commission. It is a pity that action of such moment to organisations and staff was not brought to everyone's notice soon enough for comment. But the delay was not wholly the Commission's fault, and the complainants do not explain to the Tribunal just how its collection of data was defective. Nor was there anything secretive about the exercise: organisations and staff alike were free to name independent observers.

14. The complainants' charge of bad faith fails too, being founded on mere allegation, not on any cogent evidence. In offering general strictures about the arrangements for the survey and the findings, they are merely venting suspicion. They have failed to discharge the burden of proof of bad faith.

15. No more telling is the plea that the Chairman of the Commission failed to announce the findings of the survey. On 6 June 1996 he sent the organisations and staff representatives a circular telling them of the new post adjustment index for each duty station. In the circumstances that circular is to be treated as meeting the requirements of Article 25(1) of the Commission's Statute for the application of its decisions.

16. Since none of the complainants' pleas succeeds, their complaints must fail, including their claims to costs.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 18 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-SIXTH SESSION

***In re* Heitz (No. 6)** **Judgment 1801**

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixth complaint filed by Mr. André Joseph Léon Heitz against the International Union for the Protection of New Varieties of Plants (UPOV) on 9 June 1997 and corrected on 22 July, UPOV's reply of 19 September, the complainant's rejoinder of 6 October, the comments made by the International Civil Service Commission on 26 November 1997, the complainant's comments thereon of 6 January 1998, UPOV's letter of 9 February informing the Registrar of the Tribunal that it did not wish to enter a surrejoinder, the further brief entered by the Commission on 13 February and the Union's letter of 9 March informing the Registrar that it did not wish to comment on that brief;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 13, paragraph 3, of its Rules;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the material facts of the case and the pleadings are identical to those set out, under A to G, in Judgment 1800 (*in re* Baron and others), also delivered this day;

CONSIDERATIONS

1. This case raises the same issues as do the complaints from Mr. Baron and others challenging the decisions of the Director General of WIPO in their pay slips for July 1996. The material facts, too, are the same.

Only the defendant – the International Union for the Protection of New Varieties of Plants (UPOV) – is not.

2. Judgment 1800, delivered this day, dismisses the complaints brought by Mr. Baron and others. For the same reasons this complaint too must fail.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 18 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

A.B. GARDNER

*Registry's translation,
the French text alone
being authoritative.*

EIGHTY-SIXTH SESSION

In re Dirsing (No. 2) — Judgment 1802

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mrs. Sandra Dirsing against the European Patent Organisation (EPO) on 13 February 1998 and corrected on 16 March, the EPO's reply of 5 June, the complainant's rejoinder of 17 August and the Organisation's surrejoinder of 14 October 1998;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The background to this case is set out in Judgment 1760 of 9 July 1998, which dismissed Mrs. Dirsing's first complaint as irreceivable.

The complainant works for the European Patent Office, the EPO's secretariat, in Munich. On 11 August 1993 she had a fall on her way home from work. She was entitled to twelve months' paid sick leave under Article 62(6) of the Service Regulations, and she had taken it by 27 July 1994, when her case was referred to the Invalidity Committee. In a report dated 13 February 1996, the fourth one on her case, the Committee decided by a majority that she should undergo psychiatric tests in hospital, earlier tests having failed to reveal why she was unable to work. In a written statement of 17 March 1996 her own doctor, who was a member of the Committee, dissented from the other two about the need for psychiatric tests.

She had the tests from 3 to 5 June 1996 at the psychiatric clinic of the Ludwig-Maximilian University of Munich. On 25 November 1996 she appealed to the President of the Office. She wanted the EPO to hand over to her any medical report about her, pay her financial compensation for breach of medical secrecy and disregard any reports on her state of mind. She asked the President to treat her letter as an internal appeal if he refused her claims.

By a letter of 16 January 1997 the President told her that he found her appeal devoid of merit and had passed it on to the Appeals Committee. By a letter of 5 February 1997 the chairman of the Committee acknowledged receipt of her appeal. There followed correspondence between her, the Committee and the Administration. On 13 February 1998 she filed this complaint challenging what she sees as the implied rejection of her appeal.

B. The complainant says that the defendant acted in breach of medical secrecy and of the "law for the protection of personal data". In her submission no provision of law or of the Service Regulations empowered the Organisation to have medical reports made about her or to get hold of them. By asking the hospital to let it have them it failed to ensure that they were made over in confidence to a particular addressee in the Office. A doctor may not without the patient's prior consent hand over the findings of a medical test to a third party. She does not remember releasing the doctors who saw her at the hospital from medical secrecy. The EPO is liable to her for the breach of secrecy since it was at the EPO's instructions that the fault was committed. The publication of the reports inside the Office has caused her serious moral injury because they contain detailed information about her private life and her family.

She pleads several procedural flaws. The two doctors on the Invalidity Committee who had her undergo the psychiatric tests disregarded the opinion of her own doctor, who had certified that the only cause of her incapacity was physical. Only if they had managed to show - and they did not - that her incapacity had no physical cause might they have contemplated some other explanation. She suffered moral injury by having to spend three days and two nights in a special unit in hospital. She takes it ill that the tests were done in German and not in her mother tongue. She is relying on Article 92(3) of the Service Regulations, which says that the proceedings of the Invalidity Committee are secret.

She contends that she was subjected to "constant pressure and threats" from the Organisation to undergo the tests. She consented only to escape further "retaliation" from the Organisation.

She asks the Tribunal to declare that the EPO acted in breach of medical secrecy and the privilege of personal data, to order it to hand over to her any medical report about her and to pay her moral damages. She claims the cancellation of any medical report which the hospital made about her.

C. In its reply the EPO points out that the Appeals Committee has not yet reported on her appeal of 25 November 1996. The time that the Committee has taken over her case is not unreasonable. Since the President of the Office has reached no final decision she has failed to exhaust the internal means of redress and her complaint is irreceivable.

In subsidiary argument on the merits the defendant says that it never got a copy of reports or of other medical findings on the complainant. The hospital sent them straight to the Office's medical officer in a sealed envelope bearing his name. The findings of tests are not imparted to the Administration.

The Organisation says that when the proceedings began before the Invalidity Committee the complainant signed a statement releasing the doctors who would be examining her from medical secrecy in regard to the Committee's own members. The statement is in the records kept by the medical officer.

There is no substance to her plea of breach of the "law for the protection of personal data". If what she means thereby is the guidelines for the protection of personal data at the Office, that text covers only computerised data, and data relating to the invalidity procedure are not computerised. If what she has in mind is German law, it does not apply either, both because the EPO is an international organisation and because German law too protects computerised personal data.

The Organisation denies any flaw in the proceedings that led to her having to undergo psychiatric tests. It is clear from the Invalidity Committee's reports that it acted scrupulously and did first make a finding that her incapacity had no physical cause.

Lastly, it was in no way to her detriment that the tests were done in German since she has a full grasp of the language.

D. In her rejoinder the complainant argues that the Organisation has failed to decide on her internal appeal as promptly "as the seriousness and urgency of the case require". The fault lies with the Administration, which, 13½ months after she had filed her appeal, had not yet submitted its reply to the Appeals Committee.

On the merits she maintains that the EPO got the medical reports from the hospital and that she did not release the hospital doctors from secrecy. The last release she signed goes back to 12 October 1995 and applied to the EPO's own medical officer, who was to examine her at that date. The doctors appointed by the Administration and by the Invalidity Committee are subject to municipal law. Not every breach of the rules that the EPO may commit in handling staff cases is expressly covered in the Service Regulations. She asks the Tribunal to afford her "minimum legal safeguards" when the Regulations say nothing of the protection of basic rights.

Her own doctor did not get all the reports on the psychiatric tests, and she asks the Tribunal to "rule" on that issue. She further asks the Organisation to let her have a copy of the internal guidelines it is applying for the protection of personal data not on computer.

E. In its surrejoinder the defendant observes that on 3 July 1998 the Invalidity Commission decided by a majority that the complainant was suffering from permanent and total incapacity for duty at the Office, but not because of any serious illness, work accident or occupational disease nor, by and large, because of her age. The Organisation presses its objections to receivability and submits that the further claims in her rejoinder are new and therefore irreceivable. It presses its pleas on the merits.

CONSIDERATIONS

1. Most of the background to this case is set out in Judgment 1760, which ruled on Mrs. Dirsing's first complaint. She is now seeking redress for the injury she attributes to breach of medical secrecy and of the law on the protection of personal data by a doctor appointed by the EPO or by a medical officer or by both.

2. The EPO asked its Invalidity Committee to say whether she was suffering from permanent incapacity for work at the Office. In its fourth report on her case the Committee decided by a majority that she should undergo psychiatric tests in hospital on the grounds that the many examinations that she had already undergone had afforded no explanation for the failure of earlier therapeutic treatment.

3. On 25 November 1996 she filed an internal appeal claiming -

> "condemnation of the Office's practice of getting hold of reports that include personal information and using them, without any precaution in distribution, particularly for the purpose of assessing [her] performance;
>
> the immediate forwarding to [her] of any medical report about [her] in the EPO's hands, no copy of it to be kept by the Office;
>
> an award of damages for moral, physical and occupational injury attributable to the breach of medical secrecy and of the law on the protection of personal data;
>
> the cancellation of the medical reports made at the request of the Office, or a medical officer, or both, on [her] state of mind."

4. The complainant acknowledges that she has filed suit before getting a final decision from the President of the Office on a recommendation by the Appeals Committee. She explains that her purpose is to avoid "undue further delay, the forfeiture of her rights and the continuance of the injury".

5. There being no need to rule on receivability, the Tribunal holds that in any event there is not a jot of evidence to bear out the complainant's allegations against the EPO. Insofar as she is alleging breach of medical secrecy, and even supposing such breach were proven, the EPO would not be liable and the matter would not fall within the Tribunal's competence as set out in Article II of its Statute.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 18 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

A.B. GARDNER

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EIGHTY-SIXTH SESSION

In re Efféian (No. 2)
(Application for review)

Judgment 1803

THE ADMINISTRATIVE TRIBUNAL,

Considering the application filed by Mrs. Ginette Efféian on 29 September 1997 for review of Judgment 1653;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 7 of its Rules;

Having examined the written submissions;

CONSIDERATIONS

1. In Judgment 1653 the Tribunal dismissed as irreceivable Mrs. Efféian's complaint against a decision by the Director-General of the United Nations Educational, Scientific and Cultural Organization (UNESCO) refusing to restore her special post allowance. She is now applying for the review of that judgment. She is again putting forward the claims that the Tribunal dismissed and makes a further claim to an award of damages for having had, as she sees it, to file this application for review.

2. She objects to the judgment on the grounds that it overlooked certain facts, contained material errors and failed to rule on her main contention that withholding her special post allowance was unlawful. She further objects to what she sees as an "anomaly" in the publication as part of the judgment of the dissenting opinion of one member of the Tribunal.

who took the view that her complaint should have been dismissed, not as irreceivable, but as devoid of merit.

3. On the last point she seems to be objecting, without actually saying so, to a flaw in the presentation of the judgment. But there is no rule of procedure which precludes a member of an international tribunal from publishing a distinct opinion on a case before it. There is no flaw on that score.

4. As for the complainant's other pleas, the Tribunal need only observe, as it did in Judgment 442 (*in re* de Villegas No. 4) and has often done so since, that its judgments carry the authority of *res judicata* and will be reviewed only in exceptional cases. It is true that neglect of a material fact or some material error may afford grounds for review when such neglect or error is such as to affect the Tribunal's decision. But in this case there is no such flaw. The errors which the complainant alleges, and which are misconceived anyway, go to the merits, whereas the Tribunal dismissed her claims as irreceivable and therefore did not go into the substance of her case. Nor did the Tribunal fail to rule on her main claim, about the "unlawful withholding of the special post allowance", since it dismissed that claim too as irreceivable and had no reason to entertain the merits.

5. Since the application is clearly irreceivable - including the further claim to compensation - the Tribunal dismisses it summarily and in its entirety in accordance with Article 7 of the Rules.

DECISION

For the above reasons,

The application is dismissed.

In witness of this judgment, adopted on 6 November 1998, Mr. Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

MICHEL GENTOT MELLA CARROLL JAMES K. HUGESSEN

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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EIGHTY-SIXTH SESSION

***In re* Raths (No. 5),
Schorsack (No. 2) and Stiegler**

Judgment 1804

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mr. Gaston Raths against the European Patent Organisation (EPO) on 24 October 1997 and corrected on 25 November, the second complaint filed by Mrs. Barbara Schorsack against the EPO on 29 October and corrected on 25 November, the second complaint filed by Mrs. Elisabeth Stiegler against the same Organisation on 24 October and corrected also on 25 November 1997, the EPO's replies of 13 February 1998, the complainants' rejoinders of 20 March and the Organisation's surrejoinders of 28 April 1998;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. On 16 December 1988 the European Patent Office, the secretariat of the EPO, published a notice of vacancy, No. EXT/250, for a principal administrator at grade A4. The successful candidate was to serve as portfolio manager for the Organisation's Pension Reserve Fund. The notice required, among other things, at least nine years' professional experience of finance. The Selection Board recommended an outside candidate, Mr. Stuart Courteney, although he did not have the required experience, "because of previous difficulty in filling the post ... and because he fully matches the job profile". By a letter of 14 April 1989 the Principal Director of Personnel offered Mr. Courteney an appointment at grade A3, step 1, explaining that he might expect promotion to A4 at the beginning of 1994 if he did well in his new job. Mr. Courteney accepted the offer and took up duty on 1 June 1989. At the time he had five years and four months' recognised professional experience.

In 1994 the EPO put the case of Mr. Courteney to its Promotion Board. In a report to the President of the Office the Board said that he had the ten years' experience required for a grade A4 post but did not meet the criteria set out by the President in the EPO's *Gazette* of 18 July 1994, namely an "outstanding" level of performance and twelve to fifteen years' experience, or "very good" performance and fifteen to eighteen years' experience, or else "good" performance and nineteen to twenty-three years' experience. The Board did not put Mr. Courteney on the list of promotable staff but took the view that since for four years he had had assessments which rated his performance near the top of "good" he "should" qualify for the promotion in 1994 that he had been promised in 1989.

On 3 August 1994 the President wrote by hand in the margin of the Board's report "Promotion granted because of the commitment entered into on recruitment and because the conditions are met". The *Gazette* of 12 September 1994 announced that Mr. Courteney was to be promoted and on 7 December the President promoted him to grade A4 as from 1 January 1994.

The complainants are patent examiners at Directorate-General 2 (DG2) of the EPO. At the material time they held grade A3. On 8 December 1994 Mrs. Schorsack and Mrs. Stiegler and on the 9th Mr. Raths submitted letters of appeal to the President pointing out that at the date of promotion Mr. Courteney had had only ten years and two months' reckonable experience and that, even if his performance had been found "outstanding", he had therefore been promoted one year and ten months prematurely. Pleading breach of equal treatment, they asked the EPO to issue new criteria for promotion to be applied to them and to everyone else. They also asked the President to treat their letters as internal appeals if he rejected their claims. By letters of 27 January 1995 the Vice-President in charge of

Directorate-General 4 told them that their claims were rejected. In letters of 10, 16 and 22 February they told the President that they were pressing their appeals. On 2 March 1995 the Director of Staff Policy told them that the President had referred the case to the Appeals Committee.

At the hearings before the Committee on 23 April 1997 the complainants altered their claims to seek the quashing of Mr. Courteney's promotion and awards of moral damages. The Committee took up their appeals together. In its report of 9 June it declared them receivable on the grounds that Mr. Courteney's swifter promotion to A4 caused them injury. By a majority it nevertheless recommended rejecting their appeals as devoid of merit on the grounds that his promotion had been in fulfilment of a promise made to him on recruitment and so was not promotion by selection under Article 49 of the Service Regulations.

By letters of 5 August 1997, which are the impugned decisions, the Director of Personnel Development told the complainants that the President had endorsed the Committee's recommendation.

B. The complainants now hold grade A4. They are relying on Article 49(7) of the Service Regulations, which reads:

> "Promotion to a post in the next higher grade in the same category shall be by selection from among permanent employees who have the necessary qualifications, after consideration of their ability and of reports on them. The employees must have the minimum number of years of professional experience required under the job description in order to obtain the grade for the post concerned and have at least two years service in their grade in the Office."

The complainants contend that Mr. Courteney was promoted to A4 though his performance was only "good" and he had only ten years and two months' experience. According to the criteria for promotion issued by the President in the EPO's *Gazette* of 18 July 1994, even someone whose performance is "outstanding" must have at least twelve years' experience to qualify for promotion to A4.

The complainants further contend that Mr. Courteney's promotion was in breach of equal treatment since he reached A4 faster than they did.

They ask the Tribunal to order the quashing of the decision of 5 August 1997 and grant full consequent relief, including – say Mrs. Schorsack and

Mrs. Stiegler – the quashing of Mr. Courteney's promotion. Each of them claims 10,000 German marks in moral damages. Mrs. Schorsack and Mrs. Stiegler each claim 3,000 marks and Mr. Raths 1,000 in costs.

C. In its replies the EPO submits that the claim to the quashing of Mr. Courteney's promotion – which in Mr. Raths' case it takes to be implied – came too late in the internal appeal proceedings. It is therefore irreceivable under Article VII(1) of the Tribunal's Statute because the internal means of redress were not exhausted.

The EPO doubts whether the complainants have any cause of action in seeking the quashing of Mr. Courteney's promotion, which would cause him serious material and moral injury although he accepted the Organisation's offer in good faith. They were not candidates for his post.

On the merits the Organisation contends that the recruitment of Mr. Courteney was out of the ordinary since the post to be filled was a senior one requiring special knowledge. Article 7(1) of the Service Regulations bestows on the appointing authority some discretion in recruiting staff to "posts which require special qualifications".

Letting Mr. Courteney have grade A4 was not really promotion but the fulfilment of a promise made to him on recruitment. It was warranted by the quality of his performance and the experience he had gained.

The principle of equal treatment is irrelevant because the complainants are not qualified for the post of portfolio manager and so are not in the same position as Mr. Courteney.

In comments appended to the Organisation's replies Mr. Courteney points out that he accepted the Organisation's offer of 14 April 1989 in good faith. He seeks relief for any injury that the quashing of his promotion might cause him. He says that he met all the requirements for A4 and that he would regard the quashing of his promotion as breach of contract.

D. In their rejoinder the complainants submit that they exhausted the internal means of redress and that their complaints are fully receivable.

On the merits they contend that the only rules on promotion are in Article 49 of the Service Regulations; that there was no legal basis for the promise to Mr. Courteney and that it was discriminatory.

E. In its surrejoinders the defendant maintains that the complaints are partly irreceivable and presses its pleas.

CONSIDERATIONS

1. The complainants are all permanent employees of the European Patent Office and at the material time held grade A3. Mr. Stuart Courteney was recruited on 14 April 1989 at grade A3, step 1. The complainants learnt from the EPO's internal bulletin, the *Gazette*, of 12 September 1994, that the EPO was to promote Mr. Courteney to A4. By a decision of 7 December 1994 the President of the Office so promoted him as at 1 January 1994.

2. The complainants took the view that the promotion caused them injury. They believed that the EPO had not applied the same criteria to Mr. Courteney as to themselves, particularly in that he had not had the right number of years' experience. By letters of 8 and 9 December 1994 they asked the President of the Office to "remove the breach of equal treatment" by applying to them "the amended criteria for promotion that allowed a lower number of years of professional experience" and by promoting them from A3 to A4 "in accordance with those criteria". Mr. Raths further asked the President to publish the amended criteria, apply them to "everyone who qualifies thereby" and promote retroactively from A3 to A4 "everyone who so qualified". The complainants said that if the President rejected their claim their letters were to be treated as internal appeals under Articles 106 to 113 of the Service Regulations.

3. By identically worded letters of 2 March 1995 the defendant informed them that their appeals, though provisionally rejected, were referred to the Appeals Committee. In the proceedings before the Committee the complainants amended their claims so as to ask for the quashing of Mr. Courteney's promotion as unlawful and an award of 10,000 German marks "to each of them" in moral damages.

In a report of 9 June 1997 to the President of the Office the Committee recommended by a majority rejecting their appeals as devoid of merit. The opinion and recommendation of the two members in the minority were appended. By letters of 5 August 1997, again identical, the EPO told the complainants that their appeals were rejected, and those are the decisions they are impugning.

4. The defendant applies for joinder, and the complainants concur. Since the three complaints raise the same issues of law they are joined.

5. The complainants are asking the Tribunal –

to declare that the promotion of Mr. Courteney was in breach of the Service Regulations and therefore unlawful;

to order the quashing of the President's decision of 5 August 1997 and grant them full consequent relief;

to award each of them 10,000 German marks in moral damages; and

to award 1,000 German marks to Mr. Raths and 3,000 to each of the other two complainants in costs.

Mrs. Schorsack and Mrs. Stiegler further claim the quashing of Mr. Courteney's promotion.

Receivability

6. The defendant pleads that the complaints are partly irreceivable in that the claim to the quashing of Mr. Courteney's promotion was an improper enlargement of the original appeal and was put forward neither in proper form nor in time.

7. Only at the Appeals Committee's meeting of 23 April 1997 did the complainants alter their claims to seek the quashing of Mr. Courteney's promotion and the award of 10,000 German marks to each of them in damages. According to Article 108(2) of the Service Regulations the time limit for internal appeal was three months. The promotion of Mr. Courteney, though announced in the *Gazette* of 12 September 1994, was not decided until 7 December 1994. So any challenge had to be made no later than three months from 7 December 1994. The complainants' new claim to the quashing of the promotion, not formally put to the Appeals

Committee until 23 April 1997, was out of time and is irreceivable because they failed to exhaust their internal remedies.

8. As for their other new claim, to moral damages, the defendant accepts it as receivable as a "legitimate corollary" of the complainants' original claim to retroactive promotion. Since it is receivable, the Tribunal will determine whether the promotion of Mr. Courteney caused them any actionable moral injury.

The merits

9. The complainants' first plea is that the defendant acted in breach of Article 49(7) of the Service Regulations in granting promotion from A3 to A4 to someone who did not fully qualify for it. Their second plea is breach of equal treatment.

10. At the material time promotion from A3 to A4 was governed by the following provisions:

> *Article 49 of the Service Regulations*
>
> "(1) A permanent employee may obtain a higher grade by a decision of the appointing authority:
>
> ...
>
> d) by promotion to a post in the next higher grade in the same category;
>
> ...
>
> (4) Where the appointing authority is the President of the Office he shall take his decision after consulting a Promotion Board.
>
> ...
>
> (7) Promotion to a post in the next higher grade in the same category shall be by selection from among permanent employees who have the necessary qualifications, after consideration of their ability and of reports on them. The employees must have the minimum number of years of professional experience required under the job description in order to obtain the grade for the post concerned and have at least two years service in their grade in the Office.
>
> ...

> (10) The President of the Office shall forward to the Promotion Board the names of all permanent employees who possess the necessary qualifications referred to in paragraphs 7 [and 9] above.
>
> The Board shall examine the personal file of all permanent employees satisfying the relevant requirements and may, if it so decides, interview any permanent employee under consideration.
>
> The Board shall draw up and forward to the President of the Office for his decision a list, presented in order of merit, of permanent employees who are eligible for promotion, based on a comparison of their merits, together with a reasoned report."

Note by the President to the chairman of the Promotion Board, published on 18 July 1994

> "III. Promotion from A3 to A4
>
> The eligibility for promotion to A4 follows the criteria:
>
> Individuals with a record of 'outstanding' merit between 12 and 15 years', those who are 'very good' normally between 15 and 18 years' and those who are 'good' in the range of 19-23 years' reckonable experience. Accession to each of these ranges of experience will also normally depend on the attainment of certain minimum ages, which lie within the range of 37-40 for those considered 'excellent', 40-44 for the 'very goods' and 44-48 for the 'goods'."

11. The EPO contends:

> "The advancement of [Mr. Courteney] from A3 to A4, though it complied with some features of the promotion procedure (referral to the Promotion Board to ensure impartial assessment of performance in two reporting periods) was therefore not promotion *stricto sensu* but tantamount to putting him where he would have been had he on recruitment had the nine years' experience required in the post description."

According to the EPO the advancement was lawful because Mr. Courteney got it in fulfilment of a promise made to him on recruitment, and it is fully warranted by his performance and experience. The Organisation further argues that the complainants are mistaken in pleading breach of equal treatment because they are not at all in like case. Mr. Courteney was recruited to serve an important and urgent purpose, namely to fill the post of portfolio manager. The complainants, who are patent examiners, were not qualified for that post, which requires special knowledge.

12. To the Board the EPO represented the promotion of Mr. Courteney as the fulfilment of a promise made to him on recruitment, and the Board took it as such. Yet the decision of 7 December 1994 purported to be taken under Article 49(1)(d) of the Service Regulations.

Only that decision was notified to the staff. So the complainants, who were unaware of the promise, were in good faith in challenging the promotion on the grounds that it was in breach of the Rule it actually cited. So they were right in saying that Mr. Courteney had been promoted to A4 even though he did not fully qualify under the rules set out in 10 above in that his record of performance was not "outstanding" and he did not have twelve to fifteen years' professional experience.

13. Because of the unusual circumstances in which Mr. Courteney was promoted the complainants were also right to challenge the decision: the EPO had on the face of it failed to observe the general principle of equal treatment because in promoting Mr. Courteney it did not abide by the requirements of the Service Regulations or by the criteria for promotion to which the complainants were themselves subject.

14. The conclusion is that the complainants did suffer moral injury and each of them is entitled under that head to an award of 3,500 German marks. Each of them is also awarded 1,000 marks in costs.

DECISION

For the above reasons,

1. The EPO shall pay each of the complainants 3,500 German marks in moral damages.
2. It shall pay each of them 1,000 marks in costs.
3. Their other claims are dismissed.

In witness of this judgment, adopted on 13 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-SIXTH SESSION

***In re* Hartigan** **Judgment 1805**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms Rosetta Dorothy Hartigan against the Food and Agriculture Organization of the United Nations (FAO) on 4 December 1997, the FAO's reply of 13 February 1998, the complainant's rejoinder of 17 April and the Organization's surrejoinder of 13 July 1998;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant is British and was born in 1948. She joined the staff of the FAO in 1969 as a stenographer at grade G.3. She later became a secretary and reached grade G.5.

In 1989 she began to suffer severe pain in her arms and hands. Despite many medical examinations and forms of treatment her condition grew no better. The FAO terminated her appointment on grounds of health on 16 November 1992 and the United Nations Joint Staff Pension Fund has since been paying her a disability pension. She has bilateral epicondylitis (severe inflammation of the epicondyles) and tendinitis in the hands, commonly known as repetitive strain injury.

In a memorandum of 13 November 1992 to a social security officer of the FAO she blamed her disorder on work she had been doing for years on computer. She claimed compensation for occupational illness under FAO Manual section 342, which is about compensation for illness, injury or death. She claimed (1) an annuity under Manual paragraph 342.51 for "total incapacity" resulting from "injury or illness attributable to the performance of official duties"; (2) "lump-sum compensation" under 342.53 for loss of function; and (3) "additional compensation" under 342.54 for "total incapacity of a nature that obliges [the staff member] to depend for his or her essential personal needs on the attendance of another person either constantly or occasionally" where such attendance "entails expense".

On 18 January 1993 the complainant underwent examination by the director of the Institute of Forensic and Insurance Medicine of the Catholic University of the Sacred Heart in Rome. In an undated report he expressed the view that additional compensation was unwarranted and the extent of her permanent incapacity hard to assess, though "on the basis of the clinical history" he "tentatively evaluated" it at 8 per cent.

By a letter of 21 October 1993 the secretary of the Advisory Committee on Compensation Claims told the complainant that the FAO had accepted her claim to an "annuity for total incapacity for work as a result of a service-related condition" and it would be paid to her together with her disability pension from the Pension Fund. The Organization rejected her two other claims. It rejected the one to lump-sum compensation for loss of function on the grounds that such loss was not proven in her case, the doctor having identified only pain. And her claim to "additional compensation" failed on the grounds that the disorder did not make her – as Manual paragraph 342.54 required – dependent on someone else for her "essential personal needs".

In a letter of 28 October to the secretary of the Advisory Committee she made, under Manual section 342.7, a "request for reconsideration" by a medical board. She named a doctor to represent her on it.

In its report of 27 October 1995 to the Committee the board said that it had examined her on 12 April 1995 and put her permanent incapacity at 25 per cent but saw no reason to grant her additional compensation to pay for help in meeting her "essential personal needs". On 27 December 1995 she provided further information for the Committee, explaining what her disability was and how difficult it was to meet her essential personal needs.

On 7 May 1996 the Advisory Committee endorsed the board's findings and recommended accepting the figure of 25 per cent loss of function but rejecting her claim to additional compensation. By a letter of 18 June 1996 the secretary of the Committee told her that she would be granted the lump-sum compensation for "permanent impairment (loss of function)" but not the additional compensation.

She appealed against that decision in a memorandum of 12 September 1996 to the Director-General. On 8 November 1996 the Assistant Director-General in charge of Administration and Finance rejected her appeal on the merits on the Director-General's behalf.

On 2 December 1996 the complainant appealed to the Appeals Committee pressing her claim to additional compensation.

In its report of 16 July 1997 the Committee held that the complainant needed domestic help because she had lost a quarter of her physical capacity and it recommended letting her have such compensation.

In a letter of 24 September 1997, the impugned decision, the Director-General told her that he rejected the recommendation on the grounds that the interpretation put on the Manual paragraphs had been correct and based on medical opinion.

B. The complainant finds the Organization's interpretation of Manual paragraph 342.542 too narrow and, based as it is on criteria less favourable than those it applied in at least one other case, discriminatory as well.

She objects to the Advisory Committee's interpretation of "essential personal needs". In its letter of 21 October 1993 it took the term to denote the performance of such rudimentary physical functions as "personal hygiene and ambulation" and defined them in its report as "bathing, grooming[,] dressing, eating, eliminating". The complainant submits that the term covers a much wider range of activity for which someone who is handicapped may need costly help: it is not confined to personal physical care, such restriction not being stated in the text.

She says that she was discriminated against in that a former staff member suffering from the same disorder fared better. The FAO granted the other staff member the additional compensation to help her "defray the extra expense involved for assistance with [her] daily essential needs in the home because of the impairment of [her] hands". The complainant believes that the difference in treatment is unlawful and arbitrary.

She asks the Tribunal to quash the Director-General's decision of 24 September 1997 and award her 27 million lire in lump-sum additional compensation towards the cost of the domestic help she had from November 1992 to the date of filing the complaint; another 6,240,000 lire a year in additional compensation to cover the same costs from the date of filing; and 4 million lire in costs.

C. In its reply the FAO submits that it read the Manual aright, the wording being restrictive and covering only exceptional cases.

In answer to the charge of discrimination the defendant contends that, although it did grant additional compensation to the other official suffering from the same disorder, the purpose was to make good her inability to meet essential personal needs. The complainant has not shown any such inability, and the Director-General was right to reject her claim on the strength of the medical board's and the Advisory Committee's reports. Moreover, the earlier decision came neither from the medical board nor from the Advisory Committee but from an official's own interpretation of the rules. So it is no valid precedent. And, as was said in Judgment 845 (*in re* West No. 5), "a complainant may not rely on unlawful treatment which conferred benefit on other staff members: equality in law does not mean equality in the breach of it". That holds good when the sole reason for the alleged discrimination is the misreading or misapplication of a text.

D. In her rejoinder the complainant presses both her pleas.

In enlarging on the first she contends that, even on the defendant's narrow interpretation, housework does form part of essential personal needs because it is essential to a healthy home.

As to her second plea, she submits that her case is medically just like the earlier one: the other staff member had undergone an unsuccessful operation on one hand, whereas the doctors advised the complainant against an operation on the grounds that her condition was too serious to improve. Manual paragraph 342.542 has been in force for at least twenty years, and never has the defendant contended that its restrictive interpretation was in line with consistent practice. Where more than one interpretation is tenable in law the one favourable to the staff member should prevail.

E. In its surrejoinder the defendant maintains that the additional compensation provided for in the Manual is due only in quite exceptional cases and this is not one. It rejects any charge of discrimination: the two cases are, in its submission, not comparable since the other staff member was suffering from 46 per cent permanent impairment.

CONSIDERATIONS

1. The complainant, who is British, joined the FAO in April 1969 as a stenographer at grade G.3. At the material time she was a secretary and held grade G.5. On 16 November 1992 the Organization terminated her appointment on the grounds of total incapacity for work. The United Nations Joint Staff Pension Fund has since been paying her a disability pension.

2. On 13 November 1992 she applied to the Organization for compensation for service-incurred total incapacity. She claimed an annuity under Manual paragraph 342.51; "lump-sum compensation" for loss of function, under paragraph 342.53; and "additional compensation" under paragraph 342.54.

3. On 21 October 1993 the Organization granted her the annuity and on 18 June 1996 a lump-sum compensation for 25 per cent loss of function but refused the additional compensation.

4. On 12 September 1996 she lodged an appeal with the Director-General again claiming it and citing Manual paragraph 342.542, which reads:

> "Where the injury or illness of a staff member has resulted in total incapacity of a nature that obliges him or her to depend for his or her essential personal needs on the attendance of another person either constantly or occasionally, and this attendance entails expense, additional compensation may be awarded in an amount not exceeding a reasonable cost for such attendance."

On 8 November the FAO told her of the rejection of her appeal.

5. On 2 December 1996 she went to the Appeals Committee. The Committee was at one in finding that, having lost a quarter of her physical capacity, she needed "domestic assistance". It pointed out that in an earlier case the Organization had awarded additional compensation to someone else with the same disorder. It recommended allowing her appeal. But the Director-General rejected it on 24 September 1997 on the grounds that the decision endorsed a recommendation by the Advisory Committee on Compensation Claims and that that Committee had acted on a report by the medical board that had examined the complainant. The decision to grant the other official's claim had not rested on the findings of any medical board and so the two cases were not "comparable ... from a medical point of view". Besides – said the Director-General – one "isolated" case warranted no "departure from the clear language" of Manual paragraph 342.542.

6. The complainant is asking the Tribunal -

(a) to quash the Director-General's decision of 24 September 1997; and

(b) to award her:

   (i) a lump sum of 27 million lire in "additional compensation" towards the expenses she incurred for domestic help from November 1992 until the date of filing this complaint;

   (ii) 6,240,000 lire a year in "additional compensation" as from the date of filing; and

   (iii) 4 million lire in costs.

7. The dispute turns on the construction of 342.542, more particularly the term "essential personal needs". Where a text may bear more than one meaning construction consists in taking the one that best serves the draftsman's intent. It is improper for a court to stretch the sense beyond what the words will bear: that is not just interpretation but tantamount to recasting: see, for example, the reports of the International Court of Justice, 1950, p. 229. Moreover, a basic canon of interpretation has it that as far as possible each word will be given its natural and usual meaning, not some uncommon or eccentric connotation.

8. It appears on the evidence that the complainant can move her arms and hands but not use them. The slightest manual exertion is impossible. Even brushing her teeth causes her intense pain. She cannot, for example, drive a motor car, wield a knife, peel vegetables, make a bed, grip, lift or carry anything, use public transport unless seated, cook, or wash dishes. Each of those acts is an everyday one and, taken all together, they make up part of "essential personal needs". So the complainant may be deemed incapable of meeting such needs, and help from someone else is warranted.

9. Citing articles in several medical journals, the Organization puts a narrow construction on the term "essential personal needs" in 342.542, which it says means "basic physical functions such as personal hygiene and ambulation".

10. The Organization's construction will not do. The term "essential personal needs" cannot in its usual and proper sense be confined to personal cleanliness and movement. As the complainant says, it has a wider connotation. And although, as the Tribunal has often said, it will not replace the opinion of medical experts with its own, this case hinges, not on medical opinion, but on the meaning of a rule.

11. The Organization's construction amounts to a mistake of law. The English version of 342.542 provides that additional compensation may be paid where there is dependence on the attendance of someone else for "essential personal needs", and there are no grounds for taking a narrower interpretation.

12. That being so, there is no need to entertain the plea about the grant of additional compensation to someone else with the same disorder.

13. The Tribunal cannot itself set the amounts of the additional compensation due to the complainant for the period since 13 November 1992 and for the future. It therefore sends the case back for the Director-General to decide on the amounts within six months of the date of delivery of this judgment.

DECISION

For the above reasons,

1. The Director-General's decision of 24 September 1997 is set aside.
2. The case is sent back to the Director-General, and he shall take the decisions set in 13 above.
3. The Organization shall pay the complainant 4 million lire in costs.

In witness of this judgment, adopted on 18 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

MICHEL GENTOT JULIO BARBERIS JEAN-FRANÇOIS EGLI

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-SIXTH SESSION

***In re* Gran Olsen (Nos. 1 and 2)** **Judgment 1806**

THE ADMINISTRATIVE TRIBUNAL,

Considering the first complaint filed by Mrs. Alice Gran Olsen against the World Health Organization (WHO) on 13 October 1997 and corrected on 20 November, her second complaint against the Organization filed on 20 November, the WHO's single reply of 27 February 1998, the complainant's rejoinder of 12 March and the Organization's surrejoinder of 15 June 1998;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant is Danish. She joined the staff of the WHO's Regional Office for Europe (EURO), in Copenhagen, in March 1982. She was a trainee at a local grade, C.2, in the General Service category. In October 1982 she got a fixed-term appointment. She was promoted to C.3 in May 1984 and to C.4 in October 1984. She got another promotion in 1992, to C.5, and one to C.6 in 1993, which became C.7 in July 1993 when EURO revised its grading scheme. She also served at the material time as president of the Staff Association at EURO and as such was one of the officers of the Staff Committee, the executive body of the Association.

On 3 July 1995 the Director of Administration and Finance and the acting personnel manager told her that her post would be abolished as from 31 December 1995 and that she was subject to the Organization's "reduction-in-force" procedure. By a letter of 19 September 1995 the manager told her that the Regional Director had decided to offer her a post of technical assistant at grade C.6. Since that, he said, would lower her personal grade he asked her to say whether she wanted to accept the offer, have her appointment terminated under Staff Rule 1050 or compete for posts in "a different occupational group and if so which group". In a memorandum of 20 September she asked the chairwoman of the Reduction-in-Force Committee to consider her for seven posts in three different groups and stated her preference for "Personnel Management".

On 22 September 1995, one day after she had left Copenhagen to take annual leave in the United States, she got a fax and an electronic mail message from the acting personnel manager telling her that the Regional Director had decided to offer her a post in the personnel unit at grade C.6 – again below her "personal" grade – and giving her until 25 September to choose between termination under Rule 1050 and the offer of the post in the unit provided that "to avoid conflict of interest" she agreed not to hold office on the Staff Committee. She replied by electronic mail on 24 September. Her reply took the form of a memorandum which she asked the acting personnel manager to send copies of, along with his letter of 22 September, to the members of the Reduction-in-Force Committee, among others. In the memorandum she asked the Committee to review her suitability for a post of personnel assistant at C.7; failing reassignment to that post, she would have "no choice" but to accept the offer of the post at C.6. But she challenged the alleged practice of not letting employees in the personnel unit hold office on the Staff Committee. By a memorandum dated 27 September the chairwoman of the Reduction-in-Force Committee told her that the Committee had reviewed its "decisions" but would not change its recommendation to the Regional Director.

On 21 and 27 November 1995 the complainant gave the regional Board of Appeal notice of her intent to lodge two appeals, one against the assignment on a post at a lower grade and the other against the ban on holding office in the Staff Committee while working in the personnel unit. On her appeal against the offer of a post at C.6 the regional Board recommended rejection in a report dated 31 May 1996. By a letter of 5 June the Regional Director endorsed that recommendation. On her other appeal the regional Board recommended in a report dated 7 October informing staff of the practice followed where there was any risk of conflict of interest. By a letter of 31 October 1996 the Regional Director endorsed that recommendation. The complainant then filed appeals against both decisions with the headquarters Board of Appeal, one on 2 August 1996 and the other on 30 December.

On 6 June 1997 the headquarters Board reported on her challenge to the appointment at grade C.6 and declared the appointment lawful. By a decision of 16 July 1997 the Director-General endorsed the Board's recommendation to reject her appeal and to pay one half of the costs of her attending the hearings in Geneva. That is the decision she is impugning in her first complaint.

In a report dated 1 September 1997 the Board reported on her challenge to the condition requiring her not to hold office on the Committee. The Board recommended allowing that appeal, retracting the disputed condition and granting her 5,000 United States dollars in damages plus awards of up to $1,000 towards legal costs and of any unrefunded costs of travel on account of her other appeal, for which hearings had been held in Geneva on the same day. By a letter of 31 October 1997 the Director-General rejected her appeal. That is the decision she is impugning in her second complaint.

She accepted the offer of appointment to the C.6 post in the personnel unit, though she was later moved elsewhere, still on a C.6 post.

B. The complainant submits in her first complaint that the Organization failed to comply with the reduction-in-force procedure.

Termination of the appointment of a "candidate for retention" under Manual provision II.9.360 is subject to examination by the Reduction-in-Force Committee of any applications by that candidate "to compete for posts in a different occupational group". EURO's constant practice being to invite candidates to list as many occupational groups as they wish and state their preference, the Committee had a duty to assess the complainant's fitness for posts in each of the occupational groups she had picked. What is more, it should have considered first those at her grade, and any lower ones only later. So the WHO was wrong to make her choose between termination under Rule 1050 and assignment at a lower grade before the Committee considered her for posts at her grade in the other groups as well.

Her second complaint turns on the lawfulness of requiring her to stand down from office on the Staff Committee. She submits that there were many precedents at other WHO duty stations for letting officials in personnel units hold such office. As the headquarters Board of Appeal found, there was no evidence to suggest that other international organisations did not let them do so. Making such unlawful condition a sort of ultimatum caused her anguish that warrants an award of damages. She pleads bias.

In her first complaint she seeks the quashing of the Director-General's decision of 16 July 1997, reinstatement in grade C.7 as from 1 January 1996 and full refund of the costs – including *per diem* and travel expenses – that she incurred over her appeal to the headquarters Board of Appeal, less any sums the Tribunal may award under that head for her second complaint. She claims costs.

In her second complaint she asks the Tribunal to set aside the Director-General's decision of 31 October 1997, order the "retraction" of the condition in the offer of employment of 22 September 1995, grant her $5,000 in moral damages, refund all the costs – including *per diem* and travel expenses – that she incurred over her appeal to the headquarters Board of Appeal, less any sums the Tribunal may award her under that head for her first complaint. Again she claims costs.

C. In its reply on her first complaint the WHO denies breach of the rules on reduction in force: the Committee paid due heed to her preference for personnel management and found her a suitable post in that area. Having recommended such a post, albeit at a lower grade, it had no duty to consider her for posts at a higher grade in any other occupational group. In any event she was entitled to ask it to consider her for only one other group, not for as many as she chose to mention. Although its guidelines require it to entertain requests for leave to compete in more than one field of work, it does not have to consider candidates for posts at the highest grades in all the groups they think themselves suitable for.

To her second complaint the Organization replies that setting the condition was a proper exercise of discretion. The "usual" practice has been to alert staff in the personnel unit to the risk of conflict of interest if they accepted office on the Staff Committee, but the matter had been treated "confidentially" in the few instances in which it had arisen. The defendant cites examples of officials who resigned office on advisory bodies at EURO upon joining the personnel unit. Such practice is firmly established at headquarters too and indeed is in line with Article 19 of the Statutes and Rules of the WHO's Staff Association in Geneva, which says that "membership of the Staff Committee shall be incompatible with: any office which ... requires independence in relation to the Staff Committee". In any event such office was unsuitable for someone like the complainant whose work brought free access to privileged information about staff. The defendant denies her charge of bias: it did not serve her an ultimatum but merely sought to enable her to take an informed decision. Since she is no longer in the personnel unit her claim to retraction of the condition shows no cause of action.

D. In her rejoinder the complainant observes that both disputes turn chiefly on issues of fact. One – and it relates to her first complaint – is whether the Administration asked "candidates for retention" who turned down the offer of a post at a lower grade to state only one or several occupational groups they wanted to compete in. She produces documents attesting to the Administration's practice of considering unsuccessful candidates for posts in several areas. As to her second complaint the factual issue is whether there was any practice of barring staff of personnel units from holding office on the Staff Committee. She cites several examples to show that there was no such practice in the Organization. According to precedent the only unwritten practices that may be allowed are those which enlarge on staff rights. Besides, the Administration is wrong to rely on a practice that applies only to officers of the Committee rather than to its members at large. She presses her claims.

E. In its surrejoinder the WHO maintains the arguments in its reply and comments briefly on points raised in the rejoinder. It maintains that an unsuccessful candidate has the opportunity of competing in only one other occupational group. It denies infringing the complainant's rights by reminding her of the risk of conflict of interest that her new assignment might create.

CONSIDERATIONS

1. On 1 March 1982 the complainant joined the World Health Organization at its Regional Office for Europe (EURO), in Copenhagen. She was a member of the General Service category of staff and held a local grade known as C.2. She was promoted to C.3 on 1 May 1984 and to C.4 on 1 October 1984. At the same time she was serving as president of the Staff Association of EURO. Having been elected to the full-time position of general secretary of the Federation of International Civil Servants' Associations (FICSA), she was seconded as such to Geneva on 4 February 1989 at grade G.5. On 1 March 1991 she returned to EURO and there the WHO again put her on a C.4 post. It promoted her to C.5 on 1 June 1992, to C.6 on 1 March 1993 which was converted to C.7 on 1 July 1993. She was re-elected president of the Staff Association in November 1992 and so at the material time was an officer of the Association's executive body, the Staff Committee.

2. In 1995 the Organization carried out a "reduction-in-force" exercise, and one of the posts it then abolished was the complainant's. By a letter of 19 September 1995 the acting personnel manager of EURO offered her the choice of assignment to a C.6 post in her own "occupational group", or the termination of her appointment, or the right to be considered by the Reduction-in-Force Committee for appointment to a post in another group. On 20 September she ticked the third of those options and sent a memorandum to the Committee listing three other groups she thought herself suitable for. Her first choice was "Personnel Management related duties", and she identified one C.7 and two C.6 posts in the personnel unit. The next day she went off on annual leave.

3. The Reduction-in-Force Committee at once declared her unsuited for the C.7 post but recommended her for one of the C.6 ones. It did not consider her for any C.7 post in the other two occupational groups she had suggested.

4. By Friday 22 September she was in Arizona. There the personnel unit sent her on that day a fax and an electronic mail message giving her until 3 p.m. on Monday the 25th (6 a.m. in Arizona) to choose between the C.6 post in the unit and termination under Staff Rule 1050. The unit told her that the Organization's "practice is that staff in the Personnel unit do not hold office on the Staff Committee to avoid conflict of interest" and, if she accepted the post, she "must abide by this practice". So she would have to resign as president of the Staff Association.

5. In electronic mail messages she sent to the acting personnel manager and to the Reduction-in-Force Committee on Sunday 24 September she challenged the "practice" and the finding that she was not the best candidate for a C.7 post in any of the occupational groups she had mentioned; but she said that, if her view was rejected, she would have to take the C.6 post. By a memorandum of 27 September, which she got on her return to Copenhagen on 7 October, the chairwoman of the Reduction-in-Force Committee informed her that it had reviewed her case but refused to change its recommendation. The upshot was that she accepted the C.6 post in the personnel unit. She was later assigned to a C.6 post in another unit.

6. She lodged two internal appeals with the regional Board of Appeal, one claiming assignment to a C.7 post in one of the occupational groups she had indicated, the other seeking retraction of the condition that she should not hold office on the Staff Committee. Having failed to get satisfaction, she put two appeals to the headquarters Board of Appeal, one seeking retroactive reinstatement in grade C.7 and the other retraction of the condition.

7. By a decision dated 16 July 1997 the Director-General accepted the recommendation of the headquarters Board of Appeal and rejected her claim to retroactive reinstatement in C.7, and that is the decision impugned in her first complaint. By a decision of 31 October 1997 the Director-General rejected the Board's recommendation for retracting the condition in the offer of 22 September 1995 and for paying her moral damages amounting to 5,000 United States dollars and costs. That is the decision she is challenging in her second complaint. The relief that she seeks in her first one is reinstatement in grade C.7 as from 1 January 1996 and an award of costs,

and in her second one the retraction of the requirement that she resign from the Staff Committee and awards of 5,000 dollars in moral damages and of costs.

8. She seeks joinder of her two complaints and the Organization does not object. Each party has dealt with both cases in single briefs. Although the issues of law are different the original administrative decision – the one of 22 September 1995 – and the material facts are the same. The Tribunal therefore joins the complaints to form the subject of a single judgment.

The first complaint

9. The rules on "reduction in force" are in Manual provisions II.9.330 to 360, which read:

> "330 Each candidate for retention competes, in accordance with the procedure described below, either for all posts in the Organization as a whole (if the post abolished was subject to international recruitment) or for those posts in the relevant commuting area (if the post abolished was subject to local recruitment) that match the candidate's grade, experience and qualifications:
>
> 330.1 a list is first drawn up of all posts of indefinite duration in the Organization as a whole or at the local level that are of the same grade and in the same occupational group as the post of the candidate;
>
> ...
>
> 330.3 when there are no suitable posts to be considered at the same grade or when, as a result of the competition described in paragraph 340, the candidate is found to be the least suitable for retention, a new list is drawn up in accordance with sub-paragraphs 330.1 and 330.2 but relating to posts that are one grade lower than that of the candidate;
>
> ...
>
> 340 The competition takes place in accordance with the following principles:
>
> 340.1 the candidate for retention and the incumbents of the posts listed as described in sub-paragraph 330.1 are placed in different priority groups ...;

> 340.2 the competition starts with staff members in the listed posts in the lowest priority group, who are placed in their order of suitability for retention;
>
> ...
>
> 340.5 the competition ends when either the candidate for retention has been found more suitable than another staff member or when all priority groups up to and including the candidate's own group have been considered.
>
> 350 The reduction-in-force committee submits a report to the Director-General (or regional director for a post subject to local recruitment under his jurisdiction), who takes an appropriate decision.
>
> ...
>
> 360 If the candidate for retention receives no offer of another post or declines such an offer, final action is taken to terminate his or her appointment in accordance with Staff Rule 1050, subject however to the following provisions:
>
> 360.1 if the candidate has received no offer of another post, he or she may request the committee to allow him or her to compete for posts in a different occupational group. Such a request is only accepted if, having regard to qualifications and experience, the candidate is obviously well-suited for work corresponding to that group. He or she will be presumed to be well-suited if he or she has held a post in the different occupational group at the same grade as that of the abolished post or at not more than one grade lower for at least one year during the preceding fifteen years. If the request is accepted, the procedure described in paragraphs 330-350 is applied with reference to the new occupational group;
>
> 360.2 if the candidate declines an offer of a post at a grade lower than that of the abolished post, or an offer of a post of limited duration, he or she may also make the request referred to in sub-paragraph 360.1."

The Reduction-in-Force Committee of EURO also has its own "operational guidelines", to be applied "in cases where there is ambiguity or doubt in the Manual text", viz in the above provisions of II.9. The guidelines say that the provisions of II.9.360 "may be applied only once for each individual" and, as to 360.1, that:

> "The Committee will entertain a request to compete for more than one field of work. If the candidate expresses no priority order, the Committee will determine the order by drawing lots. The procedure described in paragraphs 330-350 will be applied with reference to the first field of work

> to be reviewed. If no post is offered to the candidate, the procedure will be repeated for the next field of work, and so on. If a post is offered at any stage, no further field of work will be considered for competition."

10. The main issue that the first complaint raises is whether the Committee should proceed -

(1) "vertically" within each occupational group, starting with any posts at the candidate's own grade and then passing down to posts one grade lower in the same group and, if so, how often the process may be repeated;

or

(2) "horizontally", first taking together, for all the named occupational groups, any posts at the candidate's own grade which the Committee thinks suitable and only then passing down to posts one grade lower in all the same occupational groups.

11. As was recounted above, the complainant was first offered a post in her own occupational group at C.6, the grade just below her own. She refused it. She then named three other groups, giving personnel management as her first choice of field of work. When no C.7 post could be found for her she was offered a C.6 one instead in that group.

12. Even though 360.1 says that the candidate may compete for posts in "a different occupational group" - i.e. in one - it is to the advantage of candidates that they should be able to compete for posts in more than one. If limited to one group the candidate may not be found "obviously well suited for work corresponding" to that one; and indeed the Committee has interpreted the rules to allow consideration of the candidate for more than one group.

13. Manual provisions II.9.330 to 350 lay down the procedure for identifying suitable posts. The only question that calls for answer in this case is whether, once a post had been found in the group the complainant preferred at a grade lower than that of her abolished post, she might refuse it and demand repetition of the process for another group. Manual provision II.9.360.1 provides that, if the Committee accepts the candidate's request for leave "to compete for posts in a different occupational group", then "the

procedure described in paragraphs 330-350 is applied with reference to the new occupational group". In that event the right conferred on the candidate under 360.2 to compete in a new occupational group does not apply. So the process does not allow the candidate to compete for posts at the grade of the abolished post in all of the groups identified but stops once a suitable post is found, whether it bears the grade of the abolished post or a lower one.

14. The conclusion is that the Committee has no basis in the rules for working "horizontally" but must proceed "vertically" until it finds a suitable post in a preferred group. Since that is what it did in this case, the complainant's challenge to the Director-General's decision of 16 July 1997 and her first complaint must fail.

The second complaint

15. In support of her second complaint she pleads that in the WHO's regional offices for the Eastern Mediterranean, Africa and South East Asia there are many instances of letting the staff of personnel units hold office on staff committees; she alleges personal bias; and she observes that the headquarters Board of Appeal got in touch with the International Labour Office, the Food and Agriculture Organization of the United Nations, the International Telecommunication Union and the Office of the United Nations at Geneva, found in none of those organisations the "practice" that the WHO is relying on, and recommended paying her the moral damages on the grounds that the condition had been tantamount to an ultimatum and had caused her anguish.

16. The practice was never put in writing. The WHO's argument is that it would warn staff of personnel units of the risk of conflict of interest if they held office on a staff committee and discourage such committee members from applying for posts in personnel if they wanted to keep office. By way of justification it argues that one of the main functions of a personnel unit is to apply staff regulations, rules and policies whereas a staff association has to represent and defend the staff; since staff representatives do not always agree with management the two functions are incompatible.

17. Yet the Organization does not argue that the "practice" requires mere members of the Staff Committee, i.e. those who do not hold office, to resign an appointment to a post in a personnel unit, and it is difficult to see what valid distinction it can draw between office-holders and other members of the Staff Committee as to conflict of interest. And, independent though the WHO may be, the fact that other international organisations have no such policy does argue in the complainant's favour. It is important both to protect the right of association and to maintain a staff association's independence. The conclusion is that the condition should never have been attached to the offer that the WHO made to the complainant.

18. The Organization points out that, though the complainant asks for retraction of the condition, she is no longer employed in the personnel unit and retraction would therefore have no practical effect. That does not, however, dispose of her claim to moral damages. She is still entitled to moral damages, and the Tribunal sets the amount at the $5,000 she claims. She is also entitled to costs.

19. Lastly, the Tribunal finds no evidence of personal bias against her.

DECISION

For the above reasons,

1. The Director-General's decision of 31 October 1997 is set aside insofar as he refused to pay the complainant moral damages and costs.
2. The WHO shall pay her 5,000 United States dollars in moral damages.
3. It shall pay her 2,500 dollars in costs.
4. All her other claims are dismissed.

In witness of this judgment, adopted on 13 November 1998, Mr. Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

A.B. Garder

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-SIXTH SESSION

***In re* Storm** **Judgment 1807**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Jesper Storm against the European Southern Observatory (ESO) on 9 October 1997 and corrected on 30 January 1998, the ESO's reply of 9 April, the complainant's rejoinder of 1 July and the Observatory's surrejoinder of 25 August 1998;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant is a Dane who was born in 1961. The ESO has its headquarters at Garching, near Munich, in Germany and he joined its headquarters staff in December 1991 as a "fellow". In October 1994 it offered him a one-year contract as an astronomer and "paid associate" at its outstations at Santiago and La Silla, in Chile. Early in 1995 he applied for a post as an astronomer, still in Chile. He got it, and the ESO offered him an appointment as an "international staff member" for three years. He signed his new contract on 6 October 1995.

By a decision of 8 June 1995 the Council of the ESO amended Article R IV 1.03 of the Staff Regulations: as from 1 January 1996 it was to make cost-of-living adjustments in the pay of staff outside Germany so as to give pay in Chile and in Germany the same purchasing power.

By a memorandum of 11 January 1996 the head of Personnel told the staff in Chile that the "cost-of-living differential" between Munich, the city taken for the sake of comparison, and Santiago would not be known until March; so from January the amounts of earnings were provisional; Eurocost, the body that would be reckoning the differential, thought the figures likely to be about 25 per cent lower for Santiago than for Munich.

By a memorandum of 11 July 1996 the head of Personnel announced that the differential was "-30.6%" but would apply to only 60 per cent of basic salary and, if the Council so consented in December 1996, not to allowances in 1996; so monthly amounts of pay as from 1 January 1996 were still provisional. The memorandum went on:

> "3.1 Staff members who held a current indefinite contract on the date of the Council approval of this policy, i.e. on 8 June 1995 ... maintain their net emoluments paid according to the basic salary scale and the allowances valid on 31.12.1995 until the [cost-of-living] adjusted salaries exceed these net emoluments.
>
> ...
>
> 3.2 Staff members who held a current fixed-term contract on the date of the Council approval of this policy, maintain, until the end of their current contract and during future contract extensions, net emoluments not lower than those stipulated under point 3.1 above.
>
> 3.3 Staff members who were offered a first contract or a new contract of indefinite duration after the date Council approved this policy, will have their salary adjusted fully ..."

On 4 August 1996 staff members in Chile on contracts signed before June 1995 filed a class appeal against the "freezing of ... net salaries on the level of December 1995". On 5 August the complainant filed an appeal of his own against "the application of the cost-of-living differential" to his salary. On 26 August he and eight others who had signed contracts after June 1995 lodged another class appeal, against the cost-of-living "adjustment of 18.36% to ... basic salaries".[*]

In December 1996 the Council approved the policy of adjustment.

The Director General put the appeals to the Joint Advisory Appeals Board. In its report of 23 June 1997 the Board recommended, among other things, negotiating "a freezing of the salary scale for the international staff in Chile ... until there is parity between the frozen salary scales and the applicable [cost-of-living] index for Chile". By a letter of 11 July 1997, the impugned decision, the head of Administration told the complainant on the Director General's behalf of the rejection of his appeal of 5 August 1996.

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[*] *sc.* 30.6 per cent of 60 per cent.

B. The complainant submits that the ESO acted in breach of its duty to tell him what his conditions of service would be. At no time from the date of publication of the notice of vacancy for the post of astronomer in Chile up to the date at which he signed his contract did it warn him that his basic salary and allowances might be adjusted to the cost of living. The papers that came with his contract gave no inkling of any such retroactive adjustment, which has cost him over 18 per cent of his earnings. So at the time of signing his contract he lacked "accurate information on the essential and fundamental terms of employment".

The Observatory broke the terms of his contract and several provisions of the Staff Rules and Regulations. His earnings were not as set out in his contract, and the cut amounted to a substantial and unilateral change in its terms. The contract he signed on 6 October 1995 was not his first fixed-term one since he had been with the ESO since 1991; so, according to what the head of Personnel said in his memorandum of 11 July 1996, his net earnings should not have fallen below the amount guaranteed by the scale in force in December 1995.

Citing precedent, he pleads breach of his acquired rights on the grounds that the adjustment brought his basic salary down by 18.36 per cent in 1996 and by 14.1 per cent in the first ten months of 1997. That he sees as breach of Noblemaire – for an explanation of the principle, see Judgment 825 (*in re* Beattie and Sheeran) under 1 to 5 – in that his earnings were not such as to attract and keep in employment the citizens of member States.

In the belief that his post was akin to two held by staff members in Germany, he submits that the impugned decision discriminated against him. The Observatory gave him a lower grade than the one he would have had in Germany because the cost of living was lower in Chile. So by adjusting his pay downwards it has cut his earnings yet again.

He seeks the quashing of the impugned decision and an award of costs.

C. In its reply the ESO acknowledges no duty to give full details of the terms of recruitment, even such an important one as the amount of monthly pay. All that the Staff Regulations say is that the contract of service shall set out such essential terms as basic salary, housing allowance and other regular allowances. The complainant's contract did so. Though he lost some 18 per cent of basic salary, he knew when he signed what the adjustment would entail, the staff in Chile having thrashed out the subject.

The defendant denies breaking any term of his contract, which actually cited Article R IV 1.03 as amended by the Council. The text he signed in October 1995 was a new contract, not an extension of the old one, since his status shifted from "paid associate" to "international staff member". So he was not entitled to the protection of acquired rights that the head of Personnel's memorandum bestowed.

He knew as early as January 1996 that the figure of his earnings was only provisional and he could then have worked out what the adjustment would mean. So the doctrine of acquired rights cannot apply. Nor was there any breach of equal treatment, a principle that has nothing to do with the impugned decision. His post was not like the other two.

D. In his rejoinder the complainant submits that the material issue is not whether he was aware of the policy of adjustment before he signed his contract but whether he was able to reckon the effect of it on his earnings. The ESO "pulled a fast one". It would be unfair to refuse protection of his acquired rights on the pretext of a change in his status: he had, after all, been with the ESO since 1991.

E. In its surrejoinder the defendant points out that when the complainant signed his contract he knew full well that his pay was to be linked to the cost of living. Though able to work out what that would mean, he "accepted the uncertainty as to the exact amount of his monthly net remuneration". So he has no reasonable cause for dismay about the outcome.

CONSIDERATIONS

1. The ESO recruited the complainant on 1 December 1991 as a "fellow" under an appointment for one year and renewed it twice. In 1994 it again appointed him for one year, from 1 October 1994 to 30 September 1995, as a "paid associate". It assigned him to Santiago and La Silla, in Chile. On 1 October 1995 it gave him an appointment for three years as an international staff member, still in Chile. He left the ESO in October 1997.

2. By a memorandum of 11 July 1996 the Observatory told him that it was applying a new policy in line with the amended text of Article R IV 1.03 of the Staff Regulations, which its Council had adopted on 8 June 1995. The amendment brought in a "cost-of-living differential" to be applied to 60 per cent of the basic pay of international staff outside Germany. The differential that was applied to the complainant's basic salary as from 1 January 1996 was "-30.6%", and so he suffered a cut of 18.36 – 60 x 30.6 – per cent in pay.

3. On 5 August 1996 he lodged an internal appeal of his own with the Director General against the decision in the memorandum of 11 July 1996. On 26 August he and other staff members filed a class appeal.

4. On 10 January 1997 he got an administrative circular setting out again the terms of the memorandum of 11 July 1996 about the adjustment.

5. The appeals went to the Joint Advisory Appeals Board. In its report of 23 June 1997 it recommended, among other things, a temporary freeze of salary. The Director General rejected the complainant's appeal on 11 July 1997, and that is the decision, notified to him on 15 July 1997, which he is impugning. He pleads breach (1) of the duty to tell him beforehand of the terms of his employment; (2) of contract; (3) of acquired rights; and (4) of equal treatment in employment. There being no need to rule on all his pleas, the Tribunal will take up only the second one insofar as he is pleading breach of the terms of the memorandum of 11 July 1996.

6. Points 3.1 and 3.2 of the memorandum are reproduced in A above. The complainant submits that those rules applied to him and that by

adjusting his net earnings fully and retroactively the ESO brought his pay below the figure guaranteed under the scales in force at 31 December 1995 and so broke its own commitments under its policy of adjustment.

7. The Observatory replies that the complainant was not covered by the safeguard in points 3.1 and 3.2 because the contract it offered him on 4 October 1995 was a new one within the meaning of point 3.3:

> "Staff members who were offered a first contract or a new contract of indefinite duration after the date Council approved this policy, will have their salary adjusted fully ..."

8. The complainant is right to demur. The contract which he was offered on 4 October 1995, and which he signed on the 6th, was not his first fixed-term contract, since he had begun at the ESO in 1991 under a fixed-term one that it had renewed more than once. Nor was it a new, indefinite contract, since, as was said in 1 above, his last contract was a fixed-term one for three years. Under his earlier contracts he was a staff member within the meaning of Article I 2.01 of the Staff Rules. Points 3.1 and 3.2 of the memorandum, which benefit not just international staff, entitled him to keep his "net emoluments paid according to the basic salary scale and allowances" as at 31 December 1995 until his pay went above that figure by dint of adjustment to the cost of living.

9. The impugned decision is unlawful because it denied him the safeguard he enjoyed under 3.1 and 3.2. It cannot stand. The ESO must pay him the amounts it wrongfully withheld from 1 January 1996 to 31 October 1997.

DECISION

For the above reasons,

1. The Director General's decision of 11 July 1997 is set aside.
2. The ESO shall pay the complainant the amounts it wrongfully docked from his emoluments from 1 January 1996 to 31 October 1997.
3. It shall pay him 10,000 French francs in costs.

In witness of this judgment, adopted on 18 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

A.B. GARDNER

Registry's translation,
the French text alone
being authoritative.

EIGHTY-SIXTH SESSION

***In re* Mesfin** **Judgment 1808**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Gabre-Michael Mesfin against the International Labour Organization (ILO) on 19 January 1998 and corrected on 20 February, the ILO's reply of 9 April, the complainant's rejoinder of 12 May and the Organization's surrejoinder of 30 July 1998;

Considering Article II, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant is Ethiopian and was born in 1941. The ILO recruited him on 1 January 1974 at grade P.3. On 1 December 1983 it promoted him to P.4 and put him in charge of coordinating the work in Africa of its Labour Law and Labour Relations Branch (LEG/REL). He did so until the beginning of 1992, when it made him responsible for coordinating all the technical cooperation programmes and activities of the Branch.

According to circular 253, series 6, of 1983 an official or the responsible chief may apply for review of the grading of a post on the grounds that the duties and responsibilities are materially different from those outlined in the job description. In a minute of 6 December 1993 to the Personnel Department the chief of LEG/REL accordingly asked for the reclassification of the complainant's post on the grounds, among others, that the post of technical cooperation coordinator in that Branch had "always been at the P.5 level". On 7 December the complainant and his chief signed a "position description questionnaire" outlining what they saw as a substantial increase in the duties of his post. The questionnaire went to the Personnel Department.

In a minute of 3 May 1995 to the complainant the Department confirmed the grading of his post at P.4. On 18 May he lodged an appeal with the Professional Grading Appeals Committee.

On 19 July the secretary of the Committee sent him a report by the ILO's classifiers, who work out the number of points each post warrants. Their report said the complainant's post had been properly graded P.4 because on the strength of the answers to the questionnaire it had obtained a total of only 1,835 points, whereas the range warranting the grant of P.5 was from 2,040 to 2,479. The classifiers explained that apart from the coordination of technical cooperation all the duties of the post were similar to those that had been graded P.4 in 1983.

On 25 October the complainant put to the Committee his written comments on the classifiers' report. He saw as mistakes of fact the failure to recognise that his post had always been held by a P.5 official and that he was now responsible for other regions as well as Africa.

The Personnel Department informed him, however, in a minute of 29 August 1996 that the grading was confirmed at P.4.

On 3 December he put a "complaint" to the Director-General under Article 13.2 of the Staff Regulations. He cited several mistakes made by the Committee, one being that it had given too few points to some of the wanted qualifications. He objected to the Personnel Department's refusing to let him know the Committee's reasoning.

In a letter of 16 April 1997 the Director of the Personnel Department told him that the Director-General had decided to let him know the grounds on which the Committee had reached its conclusion. On 1 August the chief of Personnel Administration forwarded to him a statement dated 28 July by the chairman of the Appeals Committee that, though the Committee had agreed to raise the number of points allocated to his post the total was still not enough to warrant upgrading to P.5.

In a minute of 10 September to the chief of Personnel Administration the complainant raised further objections.

In a letter dated 22 October 1997 the Director of the Personnel Department answered on the Director-General's behalf the "complaint" of 3 December 1996. She revealed that the revised total number of points had come to 2,027. She said that though the posts of other officials were graded P.5 they were carrying out greater responsibilities; and that the final decision was to confirm the grading at P.4. That is the decision he is impugning.

B. The complainant contends that the grading of his post was based on incomplete information. The Professional Grading Appeals Committee failed to take account of his additional duties and gave his post too few points. Had the post got the right number of points it would have qualified for P.5. The report on his performance from 1 October 1991 to 30 September 1993 was not made out until 26 June 1995; so the Committee did not have a full record of the facts.

The complainant asks the Tribunal to quash the Director-General's decision, order thorough review of the grading procedure and re-examine the grading of his post on the strength of all the material facts. He seeks damages for material and moral injury and costs.

C. In its reply the ILO contends that the complaint is devoid of merit. The Director-General's decision rested on the conclusion that the procedural rules on grading had been duly applied. The Appeals Committee's report shows no flaws. The complainant's additional responsibilities were taken into account, but they were not managerial: he was merely helping the chief of the Branch.

Since the grading of a post depends on the duties it carries the quality of performance is irrelevant. So the complainant's performance report was not relevant to the review of the grading of his post.

D. In his rejoinder the complainant presses his pleas. He pleads that the Appeals Committee wilfully refused to take account of his performance report because it reflected what he was actually doing and warranted the upgrading of his post.

To qualify for P.5 a post need not carry responsibility for management: other officials in the Branch are at that grade even though they have no managerial duties.

E. In its surrejoinder the Organization presses its pleas.

CONSIDERATIONS

1. The complainant joined the staff of the ILO in 1974 at grade P.3. He spent four years in Africa – at Addis Ababa and Dar-es-Salaam – and then went back to headquarters, where he worked in the Labour Law and Labour Relations Branch (LEG/REL). At the date of filing his complaint he held grade P.4.

2. Until 1992 he was in charge of coordinating the technical cooperation programmes and activities of the Branch in Africa. He has since coordinated all such programmes and activities of the Branch throughout the world. In his submission that meant a big increase in his duties and called for "a broad understanding of the labour law, labour management relations and wage policy issues" and for a "high level of judgement".

3. He applied in October 1993 in accordance with circular 253, series 6, of 1983 for the upgrading of his post to P.5. But the upshot was that the Director of the Personnel Department rejected his claim in a letter of 22 October 1997, the decision he is now impugning.

4. He contends that his post qualified for grade P.5 on the grounds that his duties have grown and that all earlier holders of the post of coordinator had that grade. He asks the Tribunal to:

> "a) ... quash the decision of the Director-General regarding the reclassification of the post as the conclusions of the PGAC [Professional Grading Appeals Committee] have been drawn from incomplete and erroneous facts and serious procedural flaws;
>
> b) Examine the mistakes of facts and procedures which have been committed in the process of evaluation and in the process of appeal to PGAC;
>
> c) Assert that these mistakes have led to mistaken conclusions;

> d) Accordingly provide a ruling for the review of the whole procedure taking account of the rights to retroactivity to the benefits of subsequent decisions;
>
> e) Provide the necessary compensation for moral damages that have been inflicted on account of the biased approach of the administration and;
>
> f) Provide compensation for the appropriate financial damages and costs in consideration of the revenue lost, if the reclassification procedures had been carried out properly and in a timely manner particularly having regard to the effects it could have on pension allocations."

5. As was said in Judgment 1067 (*in re* Glenn) under 2 -

> "The grading of a post depends on evaluation of the work done and the degree of responsibility it involves. The evaluation must be done by those who by training and experience are able to apply the relevant technical criteria and the Tribunal will interfere with a decision based thereon only where the organisation is shown to have applied wrong principles or drawn illogical conclusions."

6. The complainant accuses the ILO of overlooking a material fact in that it failed to bear in mind his worldwide responsibility for coordination. But the plea fails; on the evidence he has himself adduced it is plain that the grading officers did take account of that issue.

7. He contends that the evidence was incomplete in that neither grading officers nor Committee had the latest report on his performance. That plea too must fail. Grading turns on the duties of the post, not on the quality of performance. Nor do the Master Standard for Classification of Professional Posts and the standards and procedures of the Professional Grading Appeals Committee lay any duty on the ILO to make available an official's performance reports for the purpose of a grading exercise.

8. The complainant pleads a mistake of fact in the grading officers' view that the duties of the post were merely administrative and financial. The plea cannot succeed. Comparison between the grading officers' report and the post description filled up by the complainant himself and by his supervisor reveals in the report no fatal omission of fact or factual error.

9. The complainant objects to the number of points given to elements of his post under the various headings of the questionnaire. The overlooking of "important elements" has, he says, caused him injury. But the mistakes

and omissions he is relying on are those objected to in the grading officers' report, and the Tribunal has ruled above on that issue. In the reckoning of points for each element there is no flaw that warrants quashing the impugned decision.

10. Lastly, he says that he got only sketchy information on the reasons for the Committee's findings. The evidence he offers shows that on 19 July 1995 he received the grading officers' report, which gave a grading and their reasons for it. He disagreed and appealed to the Committee. In letters of 16 April and 22 October 1997 the Organization gave him the Committee's reasoning. The Tribunal is satisfied that he did get the information he wanted. His disagreement with the reasoning does not mean that the Organization failed in its duty to let him have that information.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 18 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

MICHEL GENTOT JULIO BARBERIS SEYDOU BA

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-SIXTH SESSION

***In re* Lamarche** **Judgment 1809**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Leo Lamarche against the Pan American Health Organization (PAHO) on 26 September 1997 and corrected on 27 October 1997, the PAHO's reply of 9 February 1998, the complainant's rejoinder of 20 May and the Organization's surrejoinder of 2 September 1998;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of the Dominican Republic who was born in 1944, joined the staff of the PAHO on 3 February 1969. At the material time he held a permanent appointment as a budget officer at grade P.4.

By notice 28 of 25 September 1995 the Organization announced a competition to fill a grade P.5 post, No. 160, for the chief of the Department of Budget. The notice called for a sound knowledge of English or Spanish and a "working knowledge" of the other language. The complainant applied.

He was made acting chief of the Department on 1 October 1995 and as such earned under Staff Rule 320.4 the "extra pay" pertaining to grade P.5.

By a directive, HQ/FO-95-19, of 20 December 1995 the Organization told the staff that as from 1 January 1996 the Departments of Budget and

Finance were to merge to form a new one known as Budget and Finance. In the reform the holder of post 160 was to head the Budget Section. The complainant became the acting chief of it on 1 January 1996, and the news went out in a general information bulletin of 27 December 1995.

On 12 March 1996 the Senior Staff Selection Committee met to consider the applicants for the post. It chose Mr. Michael Usnick, a citizen of the United States who was an outside candidate. The next day the Director of the Organization saw Mr. Usnick, the complainant and a third applicant. By a letter of 5 April the chief of Personnel told the complainant that the Committee had recommended someone else. By a general information bulletin of 30 April the Organization announced the appointment of Mr. Usnick to post 160 at 1 May 1996. A letter also of 30 April from the Director thanked the complainant for acting as chief of Budget. On 4 June he gave the headquarters Board of Appeal notice of appeal against the appointment of Mr. Usnick. He later filed a full appeal.

On 1 June 1997 he was transferred from Budget to Internal Audit.

In its report of 24 June 1997 the headquarters Board held that Mr. Usnick, whose mother tongue was English, lacked "working knowledge" of the other language, Spanish. It nevertheless held that for the Organization's sake the Director might pick the candidate he put top. Not sharing the complainant's view that selection should have been left to an ad hoc Committee, the Board recommended rejecting his appeal. By a letter of 27 June 1997, the impugned decision, the Director told the complainant that he did so.

B. The complainant argues that Mr. Usnick had no "working knowledge" of Spanish. After he had got the post the Organization paid to let him have eight weeks' intensive coaching. The form giving him leave to take the course described him as a "beginner" and his purpose as to "learn Spanish". He himself had said in his application that he did not know the language. So too held the Board. Citing Judgment 1497 (*in re* Flores), the complainant pleads that "the Organization broke the basic rule of any process of selection that the successful applicant must have all the minimum qualifications required in the notice of vacancy".

Secondly, the Organization acted in breach of Manual paragraph II.3.330 by putting the applications for post 160 to the Senior Staff Selection Committee, which can recommend for chief of department but not of section. By April 1996 the post was chief of section, not of department. The right body would have been an ad hoc selection committee, no other sort offering the safeguard of membership of a staff representative.

The complainant asks the Tribunal to set aside the appointment of Mr. Usnick to post 160 and order resumption of the competition. He claims damages and costs.

C. In its reply the PAHO contends that Mr. Usnick did fully qualify for the post, was the best candidate by a long chalk, and did have "working" Spanish. Though in his application he professed no knowledge of it, he thereby misrepresented his own attainments. A Spanish-speaking member of the Senior Staff Selection Committee tackled him on the point, and so did the Director, and both felt that his grasp of Spanish and ability to speak it were up to scratch. As for the thorough coaching he had after appointment, his own wish was to become more fluent. The form that branded him a "beginner" was just a run-of-the-mill document of no weight as evidence, made out by a clerk in the Staff Development Office with no inkling of his true grasp of the language.

In subsidiary argument the Organization pleads that, even if the Tribunal held that on appointment he had lacked "working knowledge" of Spanish, his grasp of it had been sure enough for the Director to exercise his discretion, as precedent allows, and so put greater stock in his qualifications and experience. Citing Judgment 1698 (*in re* Mitastein No. 3), the defendant contends that "minimum requirements" are not the right test: the cardinal distinction is between the qualifications that are essential and those that are not. Here knowledge of languages was the least essential criterion.

The PAHO further observes that apart from languages the complainant met none of the requirements of the post.

The selection was in line with the rules. It started three months before the merger of Budget and Finance: indeed the notice referred to the chief of the Budget Department. Moreover, the chief of Budget had always been appointed on the recommendation of the Senior Staff Selection Committee.

Manual paragraph II.3.330, since amended, now says that recommending a chief of section falls to that Committee.

In comments appended to the defendant's reply Mr. Usnick avers that his knowledge of Spanish at the time of appointment met what was required of a chief of Budget. He had taken courses in Spanish and when in the United States federal administration often went on mission to Latin America, where he would speak the language.

D. In his rejoinder the complainant contends that the posts of chief of Budget, Finance and Administration at the PAHO are "reserved" to citizens of the United States who have backing from the State Department of that country. He pleads breach of the independence of international organisations and of his right to a career.

To his mind Mr. Usnick did lack "working" Spanish. A long line of precedent has it that, though an executive head may let one criterion prevail over others in ranking applicants, the winner must have all the minimum qualifications in the notice.

He presses his other pleas and his claims.

E. In its surrejoinder the defendant rebuts the complainant's pleas. It says that for reasons that have no bearing on the case Mr. Usnick has gone. So the post he held is again vacant and a new process of selection began on 22 July 1998.

CONSIDERATIONS

1. A vacancy notice that the PAHO issued on 25 September 1995 opened a competition to fill the P.5 post of chief of its Department of Budget. In line with the description of the post the notice required a "very good knowledge of English or Spanish with a working knowledge of the other". The complainant applied. By a general information bulletin of 30 April 1996 the Organization declared the winner to be Mr. Michael Usnick, who would be taking up duty on 1 May.

2. On 4 June 1996 the complainant lodged an appeal against the outcome on the grounds that Mr. Usnick did not have the "working

knowledge" of Spanish the notice had demanded. The headquarters Board of Appeal reported on 24 June 1997. It held that, though at the time of his appointment Mr. Usnick's Spanish had fallen short of the minimum standard required in the notice, the Director of PAHO had had discretion to pick the candidate he had liked best. By a letter of 27 June 1997 the Director rejected his appeal. That is the decision he is impugning, and he is asking the Tribunal to declare that Mr. Usnick lacked the required working knowledge of Spanish and that the selection went through the wrong body, to quash the appointment, to order resumption of the competition and to award him damages and costs.

3. In its surrejoinder of 2 September 1998 the PAHO says that Mr. Usnick is no longer on its staff. Since the post is again vacant and there is a new competition to fill it, the complainant's claim to resumption of the competition shows no cause of action.

4. But his claim to a ruling that the appointment of Mr. Usnick was unlawful holds good: if he were right on that score he would be entitled to damages for any moral injury.

5. His claim fails. For one thing, the evidence counters what he makes out and what is suggested by a document that Mr. Usnick did not himself write and that gave him leave to take courses in Spanish. Mr. Usnick did know enough of the language for the Organization not to have ignored the requirements of the notice in appointing him. Secondly, the Senior Staff Selection Committee was empowered in law to recommend someone for the senior post, whatever the budget service was called after the merger. And thirdly, the complainant adduces no evidence of the misuse of authority he alleges.

6. The conclusion is that he has no grounds for challenging the lawfulness of the appointment of Mr. Usnick. So his claims to moral damages and to costs must fail as well.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 13 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

MICHEL GENTOT JULIO BARBERIS JAMES K. HUGESSEN

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
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EIGHTY-SIXTH SESSION

***In re* Mussnig (No. 5)**

Judgment 1810

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mrs. Gabriele Mussnig against the World Health Organization (WHO) on 10 October 1997, the WHO's reply of 20 January 1998, the complainant's rejoinder of 3 April and the Organization's surrejoinder of 1 July 1998;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant's career at the WHO is summed up under A in Judgment 1376 of 13 July 1994 on her first complaint.

On 12 April 1991 the WHO published a notice of vacancy, No. P91/35, for a grade P.4 scientist for its Programme on Substance Abuse (PSA). The complainant applied, but on 27 November 1991 it told her that she had been unsuccessful.

In the rejoinder she filed on 10 November 1993 on her first complaint she sought "production of the evaluation of her qualifications made by Dr. Emblad and Dr. Argandoña in connection with the competition for a P.4 post in the Programme on Substance Abuse". The Tribunal ruled in

Judgment 1376 under 21 that since she had succeeded in the main claims of her first complaint it saw "no need to entertain her claim to the production of further evidence".

In a letter of 30 September 1994 she asked the competent Assistant Director-General to let her have the Selection Committee's report on the post of scientist. He answered in a letter of 1 November 1994 that, the Tribunal having declined to order disclosure, the case was "closed with respect to this issue".

In her second complaint, which she filed on 9 September 1996 and which the Tribunal dismissed in Judgment 1731 of 29 January 1998, she again sought disclosure of the Committee's report. Also on 9 September 1996 she made a like claim in an internal appeal to the Board of Appeal against the non-renewal of her appointment, and she pressed it in a letter of 25 November to the Director-General. In a letter of 14 January 1997 the Director of the Division of Personnel rejected it on the grounds of privilege.

By a letter of 18 December 1996 she had given the secretary of the Board notice of appeal against the refusal to produce the records. In a letter of 24 January 1997 the chairman of the Board answered that that appeal was irreceivable because she had already made the claim in the one of 9 September 1996. In a report of 12 March 1997 the Board rejected it as immaterial to her appeal of 9 September 1996. But by a letter of 19 March 1997 the secretary told her that the Board would sit again to hear her appeal of 18 December 1996. In its report of 21 May 1997 it held that that appeal was out of time and that in any event the refusal to disclose the records was not an "administrative action or decision affecting [her] appointment status" within the meaning of Staff Rule 1230.1. It recommended rejecting the appeal, and the Director-General told her in a letter of 7 July 1997 - the impugned decision - that he did so.

B. The complainant submits that her complaint is receivable. The Organization gave no proper answer to her letter of 30 September 1994. Its letter of 1 November 1994 can hardly be treated as a decision on her application for disclosure: the last sentence - "The case is therefore closed with respect to this issue" - was just a "passing" remark. That was why she made the claim again in her internal appeal of 9 September 1996. The final decision to reject it came only in the reply to that appeal. The Organization's dilatoriness had the effect of staying the time limit, which did not start until 7 July 1997.

On the merits she submits that the only reason for discarding her for the post was a bad appraisal of her written on 17 January 1991 by her supervisor in Angola and put in her personal file. Though eventually done away with, that report came to the notice of senior officers whose backing she needed to win the appointment. She cites a letter of recommendation dated 23 October 1996 from Dr. Argandoña, chief of the Treatment and Care unit of the Programme on Substance Abuse, who had seen her about the job in early June 1991. His letter said that he and the director of the Programme thought her "an extremely valid candidate, with sound academic qualifications, field experience, language qualifications and the general versatility required for filling the specific duties of this professional post", and that she was on the short list.

In her submission the WHO's refusal to disclose the records has prevented her from pleading properly before the Tribunal and brought about a miscarriage of justice.

She asks the Tribunal to order the Organization to let her or it have the selection records, quash the process of selection and award her three years' salary and allowances in damages and 4,000 Swiss francs in costs.

C. The WHO confines its reply to irreceivability. It submits that the complaint is out of time insofar as it is challenging the rejection of the complainant's application for the post of scientist. According to Staff Rule 1280.8.3 she should have appealed against the process of selection within sixty calendar days of getting the letter of 27 November 1991.

Her claim to disclosure of the records is time-barred too. The Assistant Director-General's letter of 1 November 1994 did convey a final and unambiguous decision to reject her application. So her appeal of 18 December 1996 was clearly out of time.

In any event Judgment 1376 dismissed her claim to disclosure of the evaluation by Dr. Emblad and Dr. Argandoña. Insofar as it relates to that issue her complaint is *res judicata*.

Citing Judgment 1513 (*in re* Fauquex), the Organization contends that she may not see the selection records.

The WHO is willing to disclose the records to the Tribunal, though not to the complainant.

D. In her rejoinder the complainant submits that, the appraisal report of 17 January 1991 having been withheld from her for years, she was unable within the prescribed time limit to tell how far it would harm her career. She maintains that the refusal to produce the selection records stayed the time limit. Since the Tribunal has never ruled on the process of selection of the PSA scientist, her complaint is not *res judicata*.

On the merits she challenges the process of selection on the grounds that an external candidate was picked for the post of scientist and is still on it though he was the only applicant not to be interviewed and had lesser university qualifications than her own. Besides, she already knew the WHO.

Discarding her has caused her grievous harm because she has since failed to land a job. The post put up for competition in 1991 is a real one, whereas anything the Organization has since vouchsafed her has proved "futile".

She insists that she wants disclosure to herself, not just to the Tribunal, and is claiming three years' pay at grade P.4.

E. In its surrejoinder the WHO contends that her pleas about the rejection of her application are irrelevant. She offers not a single sound argument in support of her view that the time limit for challenging that decision was stayed.

In subsidiary argument it submits that the process of selection complied with the rules.

CONSIDERATIONS

1. The complainant applied for a P.4 post which the WHO advertised in a notice, No. P91/35, of 12 April 1991. It told her on 27 November 1991 that she had been unsuccessful. Under Staff Rule 1230.8.3 she had sixty days in which to challenge the outcome of the competition. She failed to do so.

2. On 31 May 1993 she filed her first complaint with the Tribunal. In her rejoinder on that complaint she applied for disclosure of the papers relating to the competition. In Judgment 1376 of 13 July 1994 the Tribunal ruled on the complaint but said it need not rule on the application.

3. On 30 September 1994 she again put to the Organization her claim to disclosure. By a letter of 1 November 1994 the Assistant Director-General told her that her case was closed. On 18 December 1996 she put to the Board of Appeal an internal appeal claiming disclosure. The Board was of one mind in recommending that the Director-General reject it as irreceivable, and he told her in a letter of 7 July 1997 that he did so. That is the impugned decision.

4. She is now asking the Tribunal to order disclosure of the papers about selection for the post she applied for. She has subsidiary claims to the quashing of process of selection and to the payment of the equivalent of three years' salary and allowances at grade P.4 in material and moral damages and of 4,000 Swiss francs in costs.

5. The complainant offers no sound explanation of her failure to file an internal appeal within the time limit of sixty days which she had under Rule 1230.8.3 and which began when she got the Assistant Director-General's letter of 1 November 1994. Since she has therefore failed to exhaust the internal means of redress her complaint is irreceivable under Article VII(1) of the Tribunal's Statute.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 18 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

MICHEL GENTOT JULIO BARBERIS JEAN-FRANÇOIS EGLI

A.B. GARDNER

Registry's translation,
the French text alone
being authoritative.

EIGHTY-SIXTH SESSION

***In re* Zoccoli** **Judgment 1811**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Mario Zoccoli against the Food and Agriculture Organization of the United Nations (FAO) on 27 October 1997 and corrected on 8 December 1997, the FAO's reply of 23 February 1998, the complainant's rejoinder of 6 May and the Organization's surrejoinder of 21 June 1998;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Italian who was born in 1944, worked a short stint for the FAO in 1970. On 1 June 1971 the World Food Programme, a joint subsidiary body of both the United Nations and the FAO, took him on but it did not confirm his appointment at the end of the period of probation. On 1 December 1971 he joined the staff of the FAO's Commissary under a special services agreement. In January 1977 the FAO granted him a permanent appointment. In October 1979 it transferred him to the Programme. He has held grade G.4 since 1 August 1981.

He used to serve in the Budget Service of the Programme. On 6 July 1995 his first-level supervisor gave him the "interim mid-year review" of performance that a procedure known as "Management and Appraisal of

Performance" called for. She found him wanting. On 19 July he challenged her appraisal but on 15 September it went through. On 11 July he had moved to the Accounts Unit of the Programme, and there he serves as a budget clerk. He had been warned of that move orally on 2 June and the Director of Human Resources confirmed it in a memorandum of 6 July.

The Director of the Finance and Information Systems Division of the Programme wrote him a memorandum on 18 September 1995 to say that he would not be approving any within-grade step increment until he knew that the complainant had worked better and got on better with other staff since the mid-year review and the transfer; if his new supervisor expressed satisfaction with him by the end of January 1996 he would have the increment backdated.

The complainant wrote memoranda on 28 September to the author of the mid-year review and on 17 October to the acting Director of Human Resources asking for conciliation proceedings. On 1 November the acting Director answered that the mid-term review was an unofficial and provisional assessment, not an administrative measure or decision, and did not warrant conciliation; the purpose of it was to alert him to any shortcomings he must make good in order to get a fully satisfactory report at the end of the year; and he might challenge that report if he cared to.

By a memorandum of 31 January 1996 the Deputy Director of Finance and Information Systems told him that his output was low; although the reporting process was not over, the Deputy Director had to meet the deadline for recommendations and was advising the Director of Human Resources to withhold his increment. On 5 February the acting Director of Human Resources informed him that a decision about his increment must bide final appraisal. The appraisal was done by 29 March. His supervisor found his work still below par but rated him 3 ("fully satisfactory") because he had only just come to the unit and had been working better in the last few months. By a memorandum of 4 April 1996 the acting Director of Human Resources gave him the increment retroactively.

By a memorandum of 31 March 1996 the complainant had filed with the Director-General of the FAO a request for review of the memorandum of 31 January from the Deputy Director of Finance and Information Systems recommending withholding his increment. On 25 April the Deputy

Executive Director of the Programme rejected his appeal on the Director-General's behalf on the grounds that the Deputy Director had made a mere recommendation and that in any case he had got the increment retroactively. He lodged an appeal against that decision on 27 May 1996, citing the withholding or staying of several increments between 1986 and 1995 and unfair treatment in his division. In its report of 8 May 1997 the Appeals Committee of the FAO recommended rejection. The Director-General endorsed that recommendation in a letter of 30 July 1997. That is the decision he is impugning.

B. The complainant submits that the mid-term review overlooked some facts and got others wrong. His supervisor in the Budget Service provoked him so as to forge a pretext to have him moved to the Accounts Unit.

He accuses the Organization of harassing him, particularly over the grant of increments in 1986, 1991, 1993 and 1995. It took or threatened "negative administrative actions" to stifle his protests at "continuous, repetitive and arbitrary transfers". The powers that be in the Programme showed him "lack of consideration" and exposed him to a "hostile" environment by bungling the transfers.

The FAO is ignoring paragraph 3 of Appendix B to section 331 of its Manual, which provides for a "panel of counsel" to help staff with appeals.

He asks that the report of 6 July 1995 and any relevant papers be struck from his personal file or else treated as restricted material and put in his own file and his erstwhile supervisor's in "open or sealed" envelopes. He claims an award of 100,000 United States dollars in moral damages and the refund of the medical expenses which he incurred for treatment he says he needed because of harassment and which his medical insurance did not cover.

C. The FAO replies that since it applied the rules in assessing the complainant's performance he may not plead breach of the terms of his employment or of the Staff Regulations and Rules. The mid-year review did serve to warn him since by the end of the year his performance was found "fully satisfactory". So there is no reason to strike it from his file. As for the end-of-year report, it was good; so he has no cause of action.

His claim to moral damages for harassment from 1986 until 1993 is irreceivable because he has failed to exhaust his internal remedies. He neglected to challenge the several recommendations about increments within the time limits set in the Staff Rules and in the Tribunal's Statute. His claims to damages and to medical costs did not form part of his appeal of 31 March 1996 to the Director-General. Besides, any injury he may have suffered was his own fault.

In subsidiary argument on the merits the FAO recounts his rows with supervisors and other staff since 1982 and says he is wholly to blame. People in the Programme have shown him great forbearance.

D. In his rejoinder the complainant maintains that the report on his performance was made in breach of due process. FAO Manual paragraph 315.325 says that the final decision on grant of an increment must come within two months of the date at which it fell due. In his case it did not, and such tarrying shows the Organization's "will to create an atmosphere of intimidation, harassment and insecurity". Besides, it was on the strength of the mid-year review that he was shunted to the Accounts Unit, and that was a breach of the process of reporting.

Since the Appeals Committee did, however cursorily, look at the many unlawful administrative decisions he has suffered, his internal remedies must be deemed exhausted.

Although the Organization always let the increments through in the long run, it caused him actionable distress. Fellow staff grumbled about him just because they saw in his coming a threat to their own careers. He presses his charges of harassment and taxes the Organization with bad faith.

E. In its surrejoinder the Organization presses its pleas.

CONSIDERATIONS

1. At the material time the complainant held a post graded G.4 as a budget clerk in the Budget Service of the World Food Programme. On 6 July 1995 he saw the text of an "interim mid-year review" of his performance by his supervisor, a budget officer with the Programme. He demurred in a memorandum of 19 July. His supervisor reconsidered the

review but confirmed it and told him so in a memorandum of 15 September 1995.

2. He applied on 28 September and again on 17 October 1995 for what is known as "conciliation". The acting Director of Human Resources answered on 1 November that, being provisional and unofficial, the review amounted neither to an administrative measure nor to a decision; so conciliation did not apply.

3. On 11 July 1995 the complainant had moved to the Accounts Unit of the Programme. The Deputy Director of the Finance and Information Systems Division, to which his new unit belonged, wrote him a memorandum on 31 January 1996. It said that his within-grade step increment was being withheld because his output was low and his work needed checking.

4. On 31 March 1996 he put a request for review to the Director-General of the FAO. He objected to the refusal of the increment and asked to have any papers relevant to the review of 6 July 1995 struck from his personal file on the grounds that they had prompted that refusal.

5. In a reply dated 25 April 1996 the Deputy Executive Director of the Programme pointed out that according to the FAO's Manual appeal lay only against disciplinary action or some adverse administrative decision; the memorandum of 31 January 1996, being neither, was not appealable; in any event he had got the increment on 4 April 1996 and the final appraisal of his performance in 1995 had termed it "fully satisfactory".

6. On 27 May 1996 the complainant went to the FAO's Appeals Committee. Neither the text of his appeal nor the Committee's report is in the case records. All that emerges from the evidence is that by a decision of 30 July 1997 the Director-General dismissed his appeal of 27 May 1996.

7. In challenging that decision the complainant is asking the Tribunal to order the FAO -

(a) to strike from his personal file the interim report of 6 July 1995 and any papers relating thereto or else treat them as restricted material and put them in his own file and in that of his former supervisor – the author – in "open or sealed" envelopes;

(b) to pay him 100,000 United States dollars in moral damages; and

(c) to refund the medical costs which he incurred for treatment he says he needed because of harassment and which his medical insurance did not cover.

8. As to his first claim, Manual paragraph 340.12 reads:

> "... The Personnel File is the confidential record concerning a staff member which (with the exception of medical data) is the repository for all papers pertinent to the staff member's service with the Organization."

So it stands to reason that the complainant's file should contain any papers lawfully made out and bearing on his services with the Organization, save medical reports. In the circumstances his claim to removal of the interim review from his file must fail: there was nothing unlawful about that text and it was in any event superseded by the final appraisal, which was good.

9. In support of his other claims the complainant blames the Programme for putting him through the mill by, for example, withholding increments and transferring him over and over again. The Tribunal holds that such action fell within the ambit of management and, unless he can show otherwise, affords no grounds for his charge of harassment. Since he has offered not a shred of evidence in support, his other claims too must fail.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 13 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

MICHEL GENTOT JULIO BARBERIS JAMES K. HUGESSEN

A.B. GARDNER

*Registry's translation,
the French text alone
being authoritative.*

EIGHTY-SIXTH SESSION

***In re* Argos (No. 2), Eritja,
Flösser (No. 2), Glöckner-Leenart (No. 2)
and Olivo (No. 2)
(Applications for execution)**

Judgment 1812

THE ADMINISTRATIVE TRIBUNAL,

Considering the applications for execution of Judgment 1682 filed by Mr. Patrick Argos, Mr. Ramon Eritja, Mr. Hans Flösser, Mrs. Godefrida Cornelia Glöckner-Leenart and Mr. Jean-Christophe Olivo on 31 March 1998, the reply of 4 June from the European Molecular Biology Laboratory (EMBL) and the letter of 21 July 1998 from the complainants' counsel informing the Registrar of the Tribunal that they did not wish to file a rejoinder;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS

1. In complaints that the Tribunal ruled on in Judgment 1682 (*in re* Argos and others) staff of the European Molecular Biology Laboratory (EMBL) were claiming the adjustment of their pay in line with the rules of the so-called Coordinated Organizations as from 1 July 1992. The Tribunal held in 8 that the Council of the Laboratory had failed to follow the "guide" that decisions of those Organizations embodied. It allowed the complaints and in point 1 of its decision set aside the impugned

decisions insofar as they refused to review the complainants' pay for 1995. It sent the case back to the Laboratory to take new decisions as ordered in point 2 and under 6, 8 and 9. It explained in 6 just how far the decisions of the Coordinated Organizations were binding on the Laboratory, and it cited two earlier judgments. In 9 it bade the Laboratory, "in keeping with its own self-imposed rules, set pay scales for 1995 and pay the complainants accordingly". It awarded interest on "any sums due ... at the rate of 10 per cent a year as from the due date of payment of each sum" and 20,000 French francs in costs (point 3).

2. The judgment went out on 29 January 1998. The Laboratory paid the award of costs and told the staff that the Council would be deciding on their pay at its meeting in July.

3. In these applications for execution, filed on 31 March, the complainants object that the Laboratory has failed to execute two points of the decision: 2, which sent the case back for a new decision; and 5, which conferred the same rights on the interveners. In their submission precedent allows an organisation up to 30 days to execute. They want the Tribunal to award them a penalty in monthly amounts up to the date of execution; compound interest at 10 per cent a year from the date of filing their application on the sums due under Judgment 1682; damages for the failure to execute; and costs.

EMBL invites the Tribunal to dismiss the applications. It says that there is no 30-day rule and that it acted promptly: it paid the costs and at once told the staff what it had done by way of execution, explaining that its Council would be deciding at the next session, in July 1998. Its legal advisers needed time to consider the meaning and consequences of the judgment and the members of its Council to be informed and make up their minds. A decision was not especially urgent anyway, since its staff were to get payment of interest at the rate of 10 per cent a year on any arrears; so it had no reason to summon the Council any earlier ad hoc.

4. A firm line of precedent, that the defendant does not question, allows the filing of applications for execution: see for example, Judgment 1771 (*in re* De Riemaeker No. 4) under 2 and the others cited therein.

The only material issue is whether EMBL has complied with the judgment. It lost no time in paying the lump-sum awards. But did it tarry over taking the new decision on the complainants' claims to pay?

Contrary to what the complainants make out, there is no single time limit for executing judgments. The Tribunal's practice is to let the organisation have a reasonable amount of time to act, and what is reasonable will depend, among other things, on the circumstances and the issues at stake. To be sure, the Tribunal has said more than once that any lump-sum award by the Tribunal is to be paid in 30 days: see Judgments 1620 (*in re* Moreno de Gómez No. 2) and 1748 (*in re* Limage No. 2). That deadline holds good when the organisation may readily work out the amount due. But it does not when a case is sent back for a new decision: the time to be allowed will then turn on the peculiarities of the case.

This case had to go back to EMBL for a new policy decision on pay that lay with its Council, a body made up of representatives of member States. The Council obviously had to meet and the Administration to look into the matter and make proposals to it. Since it was already scheduled to meet in July 1998, the Administration argues that having it meet any earlier ad hoc would have been awkward; that the intention was to put the matter on its agenda for July; and that the staff would not suffer anyway, being entitled to interest at the rate of 10 per cent a year on any arrears due.

The Tribunal finds the Laboratory's explanation reasonable and convincing.

DECISION

For the above reasons,

The applications are dismissed.

In witness of this judgment, adopted on 18 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

A.B. GARDNER

*Registry's translation,
the French text alone
being authoritative.*

EIGHTY-SIXTH SESSION

Judgment 1813

***In re* Julien Urzúa (No. 2)
(Application for interpretation
and execution)**

THE ADMINISTRATIVE TRIBUNAL,

Considering the application filed by Mr. Rubén Julien Urzúa on 5 November 1997 for the interpretation and execution of Judgment 1616, the reply of 10 January 1998 by the European Southern Observatory (ESO), the complainant's rejoinder of 23 January and the Observatory's surrejoinder of 17 February 1998;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS

1. By Judgment 1616 of 30 January 1997 the Tribunal set aside decisions by the Director General of the European Southern Observatory refusing Mr. Julien Urzúa and three other former staff reinstatement in their employment. Its decision read:

> "1. The Director General's decisions dated 15 December 1995 and those of 15 September 1995 on the cases of the four complainants are set aside.
>
> 2. The cases are sent back to the Director General for due decisions on the appeals.
>
> 3. The Observatory shall pay them the awards as set out in 8 and 9 [of Judgment 1616].

> 4. It shall pay each of them 1,000 dollars in costs.
>
> 5. Their other claims are dismissed."

And 8 and 9 of that judgment said:

> "8. ... The complainants are ... entitled, not to the reinstatement they claim, but merely to review of their status. They are further entitled to awards of damages in amounts equivalent to what they would have earned from 15 September 1995 up to the dates at which decisions are duly taken on their appeals, less any indemnities the ESO may already have paid them.
>
> 9. For Mr. Julien Urzúa, who reached the age of retirement on 20 September 1996, the amount of damages shall be equivalent to what he would have earned up to that date. Moreover, there is no merit in his claim to further terminal entitlements on the strength of the contract that he signed in 1967 and that was governed by the law of Chile: the applicable law under the terms of his appointment as amended in 1972 is the ESO's own rules, and those are the rules that have been applied to him."

2. The complainant is challenging the construction the ESO has put on those passages and on point 2 and he wants execution of the texts by his own lights. He argues that point 2 required of the Director General a "due decision" on his appeal; the judgment awarded him damages equivalent to what he would have earned from 15 September 1995 up to the date at which he retired; he is entitled to a further award of damages for material and moral injury attributable to the "illegitimate tardiness" of execution; and the Observatory may not subtract any indemnities he got, the phrase "less any indemnities the ESO may already have paid" being in 8, whereas there is nothing to that effect in 9, which is about his own case.

3. The ESO asks the Tribunal to dismiss his application on the grounds that the full amount of damages awarded in the judgment is the equivalent of his earnings from 15 September 1995 to 20 September 1996, the date at which he started retirement, that the sums it paid him in termination indemnities in September 1995 were larger and that it has therefore executed the judgment.

4. Judgment 1616 is clear enough. Point 2 is irrelevant to Mr. Julien Urzúa's case since by 30 January 1997, the date of the judgment, he had begun retirement and his appointment had therefore come to an end. He claims the payment of his earnings from 15 September 1995 up to the date at which he began retirement. But the judgment does not award him any earnings. It refers to earnings only for the purpose of determining the amount of damages: what 9 means is that the amount is to be reckoned according to what he would have earned. For that purpose the Observatory had to take the figure of his earnings from 15 September 1995 up to the date of retirement and add any allowances due under the Staff Regulations, but dock the amount by any indemnities already paid.

5. The ESO has paid him more than the judgment required and has duly discharged its obligations thereunder. So none of his claims can succeed.

DECISION

For the above reasons,

The application is dismissed.

In witness of this judgment, adopted on 18 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

MICHEL GENTOT JULIO BARBERIS JEAN-FRANÇOIS EGLI

A.B. GARDNER

*Registry's translation,
the French text alone
being authoritative.*

EIGHTY-SIXTH SESSION

***In re* Salard (Nos. 2 and 3)** **Judgment 1814**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Jean-Claude Salard against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 25 October 1997, Eurocontrol's reply of 6 February 1998, the complainant's rejoinder of 24 February and the Organisation's surrejoinder of 29 May 1998;

Considering the third complaint filed by Mr. Salard against the Organisation on 18 December 1997 and corrected on 5 January 1998, the Organisation's reply of 9 April, the complainant's rejoinder of 5 May and the Organisation's surrejoinder of 21 August 1998;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the two complaints raise the same issues and should therefore be joined to form the subject of a single judgment;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Frenchman who was born in 1940, joined the staff of Eurocontrol in 1965. At the material time he was an expert at grade A5 at its Experimental Centre at Brétigny-sur-Orge in France.

In December 1996 his mother went into a geriatric hospital and in February 1997 she was to become a "long-term" patient there. Some of the costs were to be met by French social security, but about 15,000 French francs a month were not. Towards that amount would go his mother's pension, but as the only other person sharing liability the complainant still had to pay the balance of 7,000 francs a month. He applied in vain to French social security for help. His mother's admission as a long-term patient was held over to November 1997.

On 7 February 1997 he wrote a letter to a member of section 2.1 of the Human Resources Directorate of Eurocontrol. He said he wanted to "know what steps to take" to have his mother treated as a dependent child. By a memorandum of 10 March the head of the section answered that for him to qualify the cost of his mother's upkeep must be "more than one-fifth of the figure of [his] pay that was subject to the internal levy of the European Union"; and on the strength of the figures he had given he did not qualify for the dependant's allowance for his mother. He objected in electronic-mail messages, but the Director of Human Resources confirmed the refusal in a memorandum of 27 May 1997.

By a minute of 3 June 1997 he filed a "complaint" with the Director General asking to have his mother treated as a dependent child. The case went to the Joint Committee for Disputes. The Committee never met but dealt with it by correspondence. In a report dated 23 October 1997 which bore only its chairman's signature it unanimously recommended rejection. On 25 October the complainant filed the earlier of the present two suits - his second - challenging what he took to be the rejection of his claims. By a letter of 30 October 1997, the decision impugned in his other complaint - his third - the Director of Human Resources rejected his appeal on the Director General's behalf.

B. In his second complaint Mr. Salard contends that the refusal of 10 March 1997 should have come from the Director General, not from a head of section. He sees the reckoning by the head of section 2.1 as a "travesty". It enlisted a method not prescribed in any official Eurocontrol document. He says that in making the calculations the head of section should not have set a ceiling at 15,995 Belgian francs a month: the actual costs came to some 15,000 French francs, the equivalent of 90,000 Belgian francs. The material text was office notice 41/72 of 31 October 1972 - and he did not see it until September 1997 – not the "trumped-up" one, No. 15/97, of 15 September 1997.

He asks the Tribunal "to determine whether or not the claim he put to Eurocontrol is sound" and "since allowing it would hold good for only one year ... what should happen thereafter".

Citing precedent, he objects in his third complaint to the failure of the Joint Committee for Disputes to meet. Only by correspondence did its members take up his case and, in breach of the rules, it neither met nor deliberated. The Committee's report was a text that the Director of Human Resources "drafted beforehand". It was for the Director General, not the Director, to sign the final decision. Eurocontrol got the reckoning wrong. The ceiling it set on the refundable amount was arbitrary.

The complainant seeks the quashing of the decision of 30 October 1997, an order that his mother be treated as a dependent child, the rejection of Eurocontrol's mode of reckoning and an award of 35,000 Belgian francs in costs.

C. In its replies Eurocontrol submits that the second complaint is irreceivable: it "fails to meet rudimentary formal requirements" because the brief is just a "catalogue of general strictures and grievances". Also irreceivable are the claims to the continuance of derogation from the rules and to rejection of the mode of reckoning. Such decisions are general measures of a kind that is at the Director General's sole discretion and would mean ruling on how to handle the case henceforth.

On the merits the Organisation points out that the answer to the complainant's inquiry, though it came from someone competent to give it, was no decision. Though the circular of 1972 did apply to his case, in its method of reckoning Eurocontrol followed the analogy of rules in the European Union. No right may he assert to have his mother treated as a dependent child, that being allowed only "exceptionally". The precedents he is relying on are irrelevant. It is hard to get the Joint Committee for Disputes to meet but there was nothing wrong with its disposing of the case by correspondence. The Director General had empowered the Director of Human Resources to sign the decision. The complainant's innuendo about the Director is inadmissible.

D. In his rejoinders the complainant contends that his letter of 7 February 1997 was not just an inquiry but, as Eurocontrol has acknowledged more than once, a request that it treat his mother as his dependant. Citing Judgment 1095 (*in re* Gilles), he maintains that it was not free to rely on rules of another organisation that it had never itself published. It took a fictitious rate of exchange so as to deny his claim. The method of reckoning it has advocated before the Tribunal is not at all the one it actually followed in his case. It should have taken the figure of actual costs in making its calculation and asked him to fill up the questionnaire in the schedule to the office notice of 1972. It was not in earnest over getting the Joint Committee to meet. It refused to let him see his personal file. Having the Director of Human Resources sign the decision made him "both party and judge" and deprived the complainant of his right of appeal to the Director General.

E. The Organisation presses its pleas in its surrejoinders. It contends that Judgment 1095 is irrelevant because the Director General has discretion in treating someone as a dependant. The rate of exchange it applied was in the complainant's favour, and it has not advocated more than one method of reckoning. Keeping its social security scheme healthy requires limits on payments. What it refused the complainant was, not access to his personal file, but the right to attend the Committee's discussions, which are privileged. It was in order for the Committee to deal with his case by electronic-mail messages.

CONSIDERATIONS

1. The complainant is an expert at Eurocontrol's Experimental Centre at Brétigny-sur-Orge in France. His mother went into a geriatric hospital near Paris as a "medium-term" patient. When she was to become a "long-term" one the hospital told him that he must discharge his statutory duty as her descendant to pay towards her upkeep. He put at some 7,000 French francs a month the amount he himself would thus be liable for. On 7 February 1997 he wrote asking a member of section 2.1 of the Human Resources Directorate to let him "know what steps to take" to benefit under Article 2.4 of what he called the "rule of application about recognised

dependants". The article so numbered of Eurocontrol's Rule No. 7 concerning remuneration reads:

> "Any person whom the official has a legal responsibility to maintain and whose maintenance involves heavy expenditure may, exceptionally, be treated as if he were a dependent child, by special reasoned decision of the Director General, based on supporting documents."

2. The head of section 2.1 of the Directorate took the complainant's letter to be an application for having his mother treated as a dependent child. She answered in a memorandum of 10 March 1997 that he was not entitled to payment of the dependant's allowance: to qualify for payment he must be paying towards the cost of his mother's upkeep the equivalent of "more than one-fifth of the taxable earnings of an official of the European Union at the same grade and with the same family responsibilities"; and he was not.

3. In a memorandum of 27 May 1997 to the complainant the Director of Human Resources confirmed that refusal. On 3 June he appealed to the Director General; his case went to the Joint Committee for Disputes; and on 30 October 1997 the Director conveyed to him on the Director General's behalf the rejection of his appeal.

4. He lodged the first of the present two complaints on 25 October 1997 against the rejection he had inferred of his appeal of 3 June 1997: and the other one on 18 December 1997 against the express refusal of 30 October 1997, seeking rejection of Eurocontrol's mode of reckoning the sort of "heavy expenditure" that warranted grant of the dependent's allowance under Article 2.4. He claims costs.

5. Eurocontrol argues that the first of the complaints is irreceivable for not even challenging rejection of what was anyway just an enquiry. But the objection fails because Eurocontrol did reject the complainant's internal appeal after referral to the Joint Committee for Disputes. The Organisation is again wrong in contending that the complainant failed to cast his claims in clear enough terms or to offer a proper account of the facts or proper pleadings. Lastly, he may challenge not so much the text of the office notice that Eurocontrol applied to his case as the lawfulness of it and the mode of

reckoning, even though, as the defendant contends, the Tribunal will utter no injunction.

6. Besides being receivable the complaints succeed on the merits. To be sure, there is no substance to the complainant's plea that the signatories of the letters of rejection were acting *ultra vires*: the Director General had duly empowered them to impart the final decision. But that decision does suffer from two obvious fatal flaws.

7. It was on the Joint Committee's unanimous recommendation that the Director General rejected the appeal of 3 June 1997. The Organisation says that, though the members of the Committee never forgathered, they conferred by correspondence and managed to go into the case by dint of "a multiplication of messages that was tantamount to deliberations". It points out that the Committee's standing orders - office notice 6/95 of 1 March 1995 - do not stipulate that its members must all meet at once; "it is not always easy" - it makes out - "to bring together half-a-dozen people from different units" and "a structural overhaul of the Organisation in 1997, at its height in June", accounts for the Committee's not actually meeting.

8. The Organization's plea is wrong: article 3 of the schedule to office notice 6/95 does say that the Committee "shall meet", and it meets only if "all the full members, or in their absence the alternate members, are present". On that score alone there was breach of due process and the impugned decision cannot stand.

9. But it is flawed on the merits too. The Organisation acknowledges that at the material time the texts to be applied were Article 2.4 of Rule No. 7 and office notice 41/72. According to the office notice a staff member who is incurring heavy expenditure on someone's upkeep may apply for the dependant's allowance on that account, and in entertaining the application Eurocontrol will pay due heed to such things as the presumed and actual cost of "maintenance". But no more is said as to how the competent authority must exercise discretion in the matter. It is plain on the evidence that in this and in all earlier such cases Eurocontrol simply borrowed the European Union's mode of reckoning. Though the Director General does have discretion, the staff member must be made aware of any

criteria he is applying: see Judgment 1204 (*in re* Andersson and others). Here Eurocontrol had never told its staff that its abiding policy was to follow the rules of the European Union. It did put out office notice 15/97, which vouchsafed that that was what it was doing, but it explained that it was applying the Union's rules "by analogy". That is an approach the Tribunal condemned in Judgment 1095 (*in re* Gilles): an organisation must put on its own Staff Regulations and Rules "the construction they are designed and intended to bear and it may not borrow rules from other organisations".

10. The upshot is that the impugned decision must be set aside and the case go back to Eurocontrol for a new decision on the complainant's claims. He is awarded 35,000 Belgian francs in costs.

DECISION

For the above reasons,

1. The Director General's decision of 30 October 1997 is set aside.
2. The case is sent back to Eurocontrol for a new decision on the complainant's claims.
3. Eurocontrol shall pay him 35,000 Belgian francs in costs.
4. His other claims are dismissed.

In witness of this judgment, adopted on 6 November 1998, Mr. Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

MICHEL GENTOT MELLA CARROLL JAMES K. HUGESSEN

A.B. GARDNER

*Registry's translation,
the French text alone
being authoritative.*

EIGHTY-SIXTH SESSION

***In re* Gutiérrez** **Judgment 1815**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Placido Gutiérrez against the International Labour Organization (ILO) on 4 March 1998, the ILO's reply of 15 April, the complainant's rejoinder of 9 June, the Organization's surrejoinder of 28 August, the Registrar's letter of 13 October to the complainant inviting further comment, the complainant's comments of 22 October and the Organization's brief of 2 November 1998;

Considering Article II, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. By a circular, of 20 July 1985, No. 334 in series 6, the International Labour Office introduced by way of experiment a scheme for "personal promotion". It altered the scheme in 1989 by addendum to the circular and in October 1995 embodied it in Article 6.8.2 of the Staff Regulations:

> "1. Officials in the Professional category below the grade of P.5 and officials in the General Service category who have not reached the top grade of their category shall, once only in the course of their entire service with the Office, be eligible for promotion in accordance with either paragraph 2 or paragraph 3 of this article subject (in the case of the Professional category) to paragraph 4.
>
> 2. Subject to the criteria, procedures and numerical limits determined by the Director-General after consulting the Administrative Committee,

> officials referred to in paragraph 1 shall be promoted to the next higher grade of their category if:
>
> (a) their conduct has been fully satisfactory and their performance of duties has been consistently superior to that normally associated with the level of responsibilities of their job, and
>
> (b) they have served or are deemed, in accordance with the criteria established, to have served at least 13 years in their present grade."

The complainant is a Spanish citizen who was born in 1938. The ILO recruited him in 1974 at grade P.2. It promoted him to P.3 on 1 December 1976 on the upgrading of his post and to grade P.4 on 1 August 1983 after he had won an internal competition. It retired him on 31 January 1998. At the material time he was a senior application officer in the Application of Standards Branch (APPL) of the International Labour Standards Department of the Office.

On 17 April 1996 the Personnel Department told him that in accordance with circular 334 he had been put on the list of staff who had qualified in 1995 for consideration for personal promotion. By a minute of 8 November the chairman of the Selection Board informed him that the Director-General had refused the promotion on the Board's recommendation. On 3 December 1996 he applied for review. On 29 August 1997 the director of the Director-General's office told him that, having consulted the Board a second time, the Director-General saw no reason to reverse his decision of 8 November 1996.

On 31 October 1997 the complainant filed a "complaint" against that decision under Article 13.2 of the Staff Regulations. By a letter of 30 January 1998 the Director of the Personnel Department informed him of rejection. That is the decision he is impugning.

B. The complainant makes an interim application for disclosure of the Selection Boards' records.

He has several pleas on the merits.

The Board made blatantly wrong findings. The forms that he and his first-level supervisor put to the Board show that his work was, as circular 334 demanded, "above the normal requirements of the job".

The Board's assessment of him shows a formal flaw in that it took account of an unlawful appraisal of his performance.

It made a mistake of law: though the circular does not require performance to be regularly above par, the Board treated that as a criterion.

By comparing him with other candidates for personal promotion it acted in breach of equal treatment.

He asks the Tribunal to quash the impugned decision and to award him personal promotion as from 1 April 1995. He seeks awards of material damages, of 20,000 Swiss francs in moral damages and of 10,000 francs in costs.

C. The ILO replies that precedent clads the Selection Board's records in privilege. They should "not be disclosed ... unless they are necessary to judicial redress": see Judgment 440 (*in re* Molina) under 2.

On the merits the Organization says that the complainant's performance did not rise above the call of duty. The comments entered by his first-level supervisor on the form that went to the Selection Board were not borne out by the appraisals of his performance in his last job.

He is wrong in saying that to qualify for personal promotion a staff member need not consistently perform above par; the bestowal of praise now and then for particular tasks will not do.

The Board did not take account of the performance appraisal he cites: its summing-up would have been the same whatever that appraisal said. Not until it reviewed his case did it look at the appraisal, and even then only because that was the reason he had given for seeking review.

Since personal promotion is rationed comparison of the candidates for it is lawful: so says the case law. Besides, the complainant was not compared with others.

D. In his rejoinder the complainant submits that the ILO should have treated his nearing retirement "as a point in his favour or as meritorious". It discriminated against him: for another staff member it set a date for reconsidering the matter; for him it did not. He presses his other pleas and rebuts the Organization's arguments.

E. In its surrejoinder the ILO submits that the date of retirement has nothing to do with a scheme of awards for merit. Since the complainant's performance was not regularly above standard, it would have been pointless to reconsider his case the next year.

F. At the Tribunal's instructions the ILO has produced the report of the Selection Board that took up the complainant's request for review. By a letter of 13 October 1998 the Registrar sent the complainant a summary of that report and invited comment. In a letter of 22 October he observed that three members of the Board had voted in his favour and only one against. The ILO's ignoring the Board's recommendation betrays rancour.

G. In observations of 2 November 1998 the ILO explains that the reasons the Board gave for its recommendation ran counter to the "letter and spirit" of the whole scheme. Acceptance would have offended against the rules and the principle of equal treatment for everyone who qualified for promotion.

CONSIDERATIONS

1. The complainant joined the International Labour Office in 1974 on a P.2 post which rose to P.3 on 1 December 1976. He was promoted to P.4 on 1 August 1983. From 1 April 1992 he served in the Application of Standards Branch (APPL) of the International Labour Standards Department as a senior application officer.

On 17 April 1996 the Personnel Department told him that in line with circular 334, series 6, he was on the list of staff who had qualified in 1995 for personal promotion. He and his first-level supervisor filled up the relevant forms. A Selection Board met to consider everyone on the list. The circular set a quota for personal promotions, and the Board's task was to recommend the best candidates to the Director-General.

In a minute of 8 November 1996 the chairman of the Board told the complainant on the Director-General's behalf that he had been unsuccessful. On 3 December 1996 he applied for review under paragraph 15 of the circular. On 29 August 1997 the director of the Director-General's office answered that the Director-General had consulted another Selection Board but saw no reason to go back on the decision of 8 November 1996. The complainant challenged the new decision in a "complaint" under Article 13.2 of the Staff Regulations. By a letter of 30 January 1998 the ILO rejected it for reasons it gave.

That is the decision he is challenging and his complaint is in time. He claims the quashing of the decision, the grant of the personal promotion, redress for the delay and awards of 20,000 Swiss francs in moral damages and of 10,000 in costs.

The Organization asks the Tribunal to dismiss the complaint.

2. The complainant applies for disclosure of the reports of the Selection Board that met on 25 July and 21 August 1996 and of the one that reviewed his case on 28 January 1997. Though he takes the Organization to task for failing to divulge the membership of the second Selection Board, he lays no claim to disclosure. With his rejoinder he has himself produced a copy of the first report; so on that score his application shows no cause of action.

The Organization observes in its reply that the second report is the "minutes of the Board's meeting". It contends that according to the case law the minutes are privileged and not to be brought forth unless requisite to the Tribunal's ruling; but if they are it will disclose them to the Tribunal.

When there is a process of selection to fill a post or bestow some boon the records are indeed ordinarily privileged: the organisation may not reveal to one candidate information about any of the others. Yet if there is a dispute a candidate has a rightful interest in proving material facts. So the case law prescribes disclosure of any privileged item of evidence that goes to the nub. Precautions may be taken to keep from the complainant's ken immaterial information on a third party such as another candidate. Among the many precedents see, for example, Judgments 556 (*in re* Ali Khan) under 4; 557 (*in re* Ali Khan No. 2); 1223 (*in re* Kirstetter No. 2); 1372, (*in re* Malhotra (Kashmiri Lal)) under 11 and 12; 1436 (*in re* Sala No. 2) under 6; 1513 (*in re* Fauquex) under 6; 1564 (*in re* Malhotra (Kashmiri Lal) No. 5) under 7 and 8; 1687 (*in re* Bedrikow No. 2) under 6; and 1728 (*in re* Swaroop) under 16.

Because of the complainant's charge of abuse of authority and his other pleas the Tribunal wished to learn the Selection Board's reasoning and give the complainant his say as far as need be. So it ordered disclosure to it of the Board's minutes. It then let him have its own capitulation of the passages about him but not of those about anyone else. It asked the Organization to reveal the names of the Board's members - see Judgment 556 under 5 - and, the Organization having done so, passed them on to the complainant.

3. Personal promotion is a means of letting a staff member have a grade higher than the one his post bears: see Judgment 1500 (*in re* Pary No. 4) under 4.

Circular 334 cited above used to say how staff might qualify and what the procedure was. Now there is Article 6.8.2 of the Staff Regulations as well.

Personal promotion is at the Director-General's discretion. The decision is subject to only limited review and will stand unless it shows some formal or procedural flaw or mistake of fact or of law or neglected a material fact or was *ultra vires*, or unless there was misuse of authority or an obviously wrong conclusion was drawn from the evidence: see, for example, Judgment 1500 under 5.

The complainant has the following pleas.

(1) The ILO denied him due process by not letting him see the reports of the two Boards.

(2) It did so again by refusing to name the members of the second one.

(3) The Director-General erred in law by espousing the Board's view that only consistently above-average performance earned personal promotion, a criterion not in the rules.

(4) There was a mistaken finding of fact anyway in holding that he did not meet it: his performance reports and appraisals by his supervisors attested to his consistently going beyond the ordinary call of duty.

(5) There was another mistake of law in breach of equal treatment: all those who qualify for personal promotion should get it, however many they may be and however they may compare with each other.

(6) It was an abuse of authority for the Director-General to refuse him promotion on unstated grounds and on the false pretext that he fell short.

4. As to the first Board's report any breach of due process was purged by his getting hold of it in time to take full account of it in his rejoinder.

Likewise, he has had the gist of the comments on him in the second report and so has been free to rely on them in his pleadings to the Tribunal. Any derogation from due process has again been cured.

5. The ILO refused to let him know who had sat on the Board on the grounds that all he need know was the reasons for its opinion.

The Organization is mistaken. To ensure due process both in internal proceedings and before the Tribunal the staff member must get any items of information material to the outcome. And one such item is the names of the advisory body's members. Who they are may of course affect its reasoning and the weight its report carries, and so the staff member should be allowed at least to comment. That is why the Tribunal will acknowledge a complainant's right to know who sat in his case.

As was said in 2 above, the complainant has been given the names of the Board's members and allowed to comment in a further brief. Again the breach of due process has been put right.

6. Because of the quota set in circular 334 the first Board was able to propose only four promotions. First it discarded any candidates who did not measure up, i.e. whose performance was not – as paragraph 9 of the circular would have it – "regularly performed at a level above the normal requirements of the job". It then compared on merit those who were left.

The Director-General having endorsed the first Board's view that the complainant did not qualify, he did not go forward to the stage of comparison.

The complainant submits that paragraph 9 does not require consistently above-average performance. The Organization retorts that such performance affords the whole basis for personal promotion and it cites paragraph 5:

> "The objective of the personal promotion system is to offer the possibility of promotion to long-serving officials whose contribution to the Organization goes beyond that normally associated with the level of the position they occupy, as evidenced by their performance over the years ..."

The Organization's view is right: it is grounded in the circular and answers the purpose of personal promotion.

The complainant's plea fails.

7. He submits that in any case he did consistently outdo expectations. He cites his fine record and the appraisal which, as the circular required, his supervisor wrote for the Board and which he thinks should have clinched the matter. He imputes to the Director-General an obvious mistake of fact in overlooking that decisive evidence and following the first Board.

The Organization's reply is that it was up to Board and Director-General to determine at discretion whether on the evidence he answered the dictates of the circular. To tell whether his performance was consistently above what his job called for they had to compare the description of his post and the work he was actually doing. And the evidence was that his performance, though his supervisors were fully satisfied with it, had not consistently surpassed what was expected of him. His first-level supervisor did say:

> "In substance his work is outstanding and regularly far beyond ordinary requirements ... particularly as to all matters relating to the submission and ratification of the Conventions he is in charge of."

But the ILO says that that opinion was neither borne out by the reports on his performance in his last posting, in APPL, nor consistent with the description of his duties in the report forms. Nor did it tally with the notice which was published to advertise his post after he had gone and which showed that the holder of his post was in charge of the submission and registration of ratifications.

He argues that the opinion his supervisor wrote for the Board should have determined whether his performance had been consistently above par. He is wrong. According to the circular the supervisor's opinion is just one item that the Board and the Director-General will bear in mind, and in any event they are free to check it.

He contends that that opinion, and not his periodic performance reports, mattered in assessing him. He surmises that the only poor report he got misled the Board and the Director-General. A former chief with whom he had been in bad odour had written it over five years earlier; but it had prompted his transfer and, though it had misjudged him, he had let it go through so as not to forfeit the transfer.

The Organization denies that it had aught to do with the impugned decision. At the first stage of selection the Board merely said that he had not consistently performed beyond expectations, and to reach that conclusion it had not needed to look at the appraisals in his regular reports. Besides, the Organization would have been entitled to rely on a report he had failed to challenge at the time.

The complainant has not shown, and it seems unlikely, that the report had any influence on the impugned decision. The conclusion is that there was neither any mistaken finding of fact nor the mistake of law he sees in pitching the qualifying requirement too high.

8. He pleads discriminatory treatment: personal promotion should go to all who pass muster, however they compare, and without any maximum number.

There he is challenging not so much the application as the substance of circular 334, and he cannot succeed.

Only those who are in the same or like case may claim equal treatment and of course only comparison will tell whether they are.

If the complainant wants the barriers to be lowered to let everyone over he fails to show any justification for that in the rules. As circular 334 explains, the purpose of the ILO's scheme for personal promotion is to put up the pay of staff with an unusually fine record when the rules do not ordinarily allow it. There is nothing discriminatory about such exceptional treatment. It is indeed only reasonable to keep it exceptional by setting high standards and the quota. The rules make the process of selection objective and fair and again conduce to equality of treatment.

The complainant fails too to show discrimination. He cites no instance of the grant of personal promotion to anyone in the same or like case, particularly by the criterion of consistently above-average performance.

9. Lastly, he pleads abuse of authority in that the Director-General was resolved not to promote him and so misapplied the rules.

The burden of proof rests with him and he has failed to discharge it. His argument is implausible anyway. It was the first Selection Board that dropped him, and the Director-General merely followed suit. After referral to the second Board he upheld his decision, gave the reason why - namely that nothing new had come to light and so there was, to quote paragraph 15 of the circular, no "important error of a factual nature" warranting review - and said that the original decision held good.

The minutes of the second Board's meeting show that, though one majority found in his favour, another thought that his performance had not been consistently above normal requirements. That bore out the opinion of the first Board.

The complainant had a good record and is understandably disappointed. But that affords no grounds for declaring unlawful the refusal to grant him an exceptional benefit for which the qualifications are stringent.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 18 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-SIXTH SESSION

***In re* Gutiérrez (No. 2)**

Judgment 1816

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Placido Gutiérrez against the International Labour Organization (ILO) on 4 March 1998, the ILO's reply of 15 April, the complainant's rejoinder of 9 June and the Organization's surrejoinder of 28 August 1998;

Considering Article II, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant's career at the International Labour Office is summed up in Judgment 1815, delivered this day on his first complaint.

He was born on 18 January 1938, and for him the age of retirement was sixty. According to ILO circular 433, in series 6, of 4 April 1990 the date of his retirement was to be 31 January 1998. On 25 July 1997 he applied to the Personnel Department for the extension of his appointment by five months beyond that date. By a minute of 9 September the Department answered him that the Director-General had refused. On 31 October 1997 he filed a "complaint" against that decision. In a letter of 30 January 1998 the Director of the Department told him that it was rejected. That is the decision he is impugning.

B. The complainant contends that the ILO broke the rules on extensions of contract beyond the age of retirement. He should have had such extension: he was the only Spanish-speaking member of the Professional category of staff in the Application of Standards Branch (APPL), and his supervisor "showed" that it would not be in the Organization's interests for him to leave at the scheduled date.

To refuse him the extension was arbitrary because some staff did get it.

The Director-General should have given "at least a brief" explanation of his decision.

He asks the Tribunal to quash it and grant him five months' extension or, failing that, an award of damages in the amount he would have earned in the five months, plus interest.

C. In its reply the ILO points out that circular 433 is no longer relevant and the material rules do not now allow anyone to stay on after the age of retirement.

Although the Director-General has made a few exceptions, not to have done so would have harmed the Organization's interests. The post that the complainant held does not require a grasp of Spanish.

Though the explanation of the decision of 9 September 1997 was not as full as it might have been, the decision of 30 January 1998 does dwell at length on the reasons for refusing extension.

D. In his rejoinder the complainant submits that the Personnel Department substituted its own assessment of the Organization's interests for that of his supervisors, who knew best. His post did call for Spanish since it was someone Spanish-speaking who got it.

He changes his claims: he seeks only the award of the amount he would have earned in the extended period, plus interest.

E. In its surrejoinder the defendant denies ignoring its own interests: the recommendation by the complainant's supervisors was not a sufficient condition for extending his appointment. Though the staff member who took over his post is indeed Spanish-speaking, he works in the ILO's three official languages, as the notice of vacancy required.

CONSIDERATIONS

1. The complainant, a Spanish citizen who was born on 18 January 1938, joined the International Labour Office in 1974 at grade P.2. On 1 December 1976 his post was upgraded to P.3. He rose to P.4 on 1 August 1983. On 1 April 1992 he became a senior officer in the Application Branch of the International Labour Standards Department.

January 1998 being the month of his sixtieth birthday, his contract was to run out on the 31st.

By a minute of 25 July 1997 he asked the Personnel Department to extend his contract, by five months, to 30 June 1998. Appended was a favourable recommendation from two supervisors, the head of the branch and the Director of the Standards Department.

The answer made on the Director-General's behalf was no: a rule was a rule and it allowed of no exception.

On 31 October 1997 Mr. Gutiérrez put a "complaint" to the Director-General under Article 13.2 of the Staff Regulations.

A reply came on 30 January 1998 from the Director of Personnel: the Director-General was sorry that he could not but uphold his decision.

The complainant originally sought the quashing of that decision and the grant of the extension or else an award of damages in the amount of his earnings for the duration, plus interest. In his rejoinder of 9 June 1998 he claims only the award.

The nub of the complainant's case is that the Director-General was guilty of abuse of discretion by applying the rules arbitrarily. The complainant was – he says – the only Spanish-speaking member of the branch; so it was in the ILO's interests to let him stay on until 30 June 1998. His supervisors were both agreed on that, and they knew better than the Director-General what the branch needed. The Director-General chopped and changed: first he pleaded a hard-and-fast rule; then he owned up to making some exceptions. The complainant feels discriminated against.

The Organization asks the Tribunal to dismiss the case. In its view extension would have been an unwarranted departure from the rules and not at all in the Organization's interests, of which the Director-General is a better judge than any head of branch or department. The branch did not need a Spanish-speaking official full-time. The post was filled on 1 April 1998 by transfer; the terms of the competition for it did not call for mother-tongue Spanish, even though the complainant's successor is Spanish-speaking; and there is nothing inconsistent about the Director-General's approach: though he began by saying that there were no exceptions he correctly explained later that he had allowed a few, but only where the Organization's interests so demanded; and in the complainant's case they did not.

2. Article 11.3 of the Staff Regulations reads:

> "An official shall retire at the end of the last day of the month in which he reaches the age of sixty-two. An official appointed before 1 January 1990 shall retire at the end of the last day of the month in which he reaches the age of sixty. In special cases the Director-General may retain an official in service until the end of the last day of the month in which the official reaches the age of sixty-five. The Administrative Committee shall be consulted before a decision is taken to retain in service an official below the grade of P.5. The Administrative Committee shall be informed of any decision to retain in service any other official. The provisions of this article shall not apply to an official appointed for a fixed term to a technical cooperation project."

The ILO points out that circular 433 in series 6 (Personnel) is no longer in force. What replaced it was circular 526 in series 1 (Director-General's announcement) as confirmed by circular 574, in series 6, of 21 August 1997. Circular 526 cancels forthwith the concession of extension beyond the ordinary age of retirement and anounces a return to "the normal application of Article 11.3" of the Staff Regulations. Circular 574 reaffirms:

> "officials who reach retirement age in the course of the period of September 1997 through 1999 cannot be extended beyond the month in which they reach retirement age."

Article 11.3 empowers the Director-General to grant exceptional extensions beyond the ordinary age of retirement. The Tribunal will exercise only limited review over such exercise of discretion. It will interfere only if the decision was *ultra vires* or broke some rule of form or of procedure, or rested on a mistake of fact or of law, or overlooked a material fact, or if there was a clearly wrong finding of fact or abuse of authority: see, for example, Judgment 1143 (*in re* Jones) under 3.

3. Without making it a formal plea the complainant says that the reasons that the ILO gave for the original refusal of extension were inadequate or wrong.

That is immaterial since he later got enough explanation to be able to plead his case properly. Besides, the ILO did account for the decision he is impugning.

4. He challenges either the rule itself or the manner of applying it to himself on the grounds that the Organization is now well enough off to afford a freer approach.

No practice that abides by the wording of Staff Regulations may be deemed unlawful.

Although the staff member may indirectly challenge the lawfulness of a rule, here the complainant neither shows nor even contends that Article 11.3 is in breach of his rights.

The plea fails.

5. The complainant imputes to the Director-General abuse of discretion in denying that the Organization badly needed him to stay on.

That plea too must fail. It is management – here the Director-General – that decides what the ILO needs. It is in the Organization's interests to abide by its own rules, including Article 11.3, which allows of derogation only "in special cases". The Director-General is, as such, a better arbiter of the Organization's broad needs than are heads of particular units. So the complainant is wrong: his supervisors' views did not clinch the matter. Besides, doing for a short spell without a Spanish-speaking official was not much of a threat to the efficiency of the branch, or so at least would suggest the vacancy of the post for two months after he had gone. In the meantime someone could surely, if need be, have readily been brought in from another unit. That the complainant had experience and a fine record afforded no sufficient reason for derogation: after all, so do many on the eve of retirement.

6. The complainant is by implication pleading discriminatory treatment of staff in the grant of derogations under 11.3. That plea requires comparison of the treatment of staff by the Director-General in the exercise of his discretion; so the Tribunal may review his decisions only within the narrow bounds set out in 2 above.

The Director-General admits to granting extension for the sake of the ILO's interests in special cases. Indeed the complainant cites some.

At all events the burden is on him to show that extension was granted in a case like his own. He has failed even to argue as much, let alone discharge that burden.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 18 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-SIXTH SESSION

***In re* Jassogne** **Judgment 1817**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss Framboisette Jassogne against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 18 September 1997, Eurocontrol's reply of 23 January 1998, the complainant's rejoinder of 18 April and the Organisation's surrejoinder of 23 July 1998;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, who was born in 1956, is a Belgian journalist who writes on aeronautics in Europe. She joined the staff of Eurocontrol on 1 April 1996 under a contract for five years. She was an administrative assistant at grade B4. The letter appointing her put her on probation for nine months. She held a post as editor in External and Public Relations at the general secretariat in Brussels.

On 17 July 1996 she saw her supervisors about the drafting of her "interim probation report". On the 18th the head of the Human Resources Directorate sent her the text of it together with a record of the meeting. The report described her as "unsatisfactory" under five of the six heads of assessment; and according to the record her supervisors had told her that she was too poor at writing for the extension of her probation to serve any likely purpose.

On 23 July she submitted comments on report and meeting. She rebutted the criticisms and asked for a meeting of the Reports Committee in accordance with Article 9 of the Staff Regulations. By a memorandum of 26 July the acting Director of Human Resources told her that the Director of the General Secretariat was in favour of dismissing her and that her case had therefore gone to the Reports Committee.

In a report of 21 August to the Director General the Committee said that it was not in the Organisation's interests to keep her on and it recommended terminating her probation at 1 September 1996. On 23 August the Director of Human Resources decided on the Director General's behalf to terminate her appointment under Article 36 of the Staff Regulations with the required one month's notice, i.e. at 1 October 1996. He told her to clear out at once.

On 22 November 1996 she filed a request under Article 92(2) of the Staff Regulations for review of the decision of 23 August. She claimed reinstatement and material and moral damages. By a letter dated 28 May 1997, but sent the next day, the secretary of the Joint Committee for Disputes told her that the Committee would hear her on 4 June. In a letter of 3 June to the Committee her counsel said that the time was too short for him to plead her case. The Committee met on 4 June in her absence. By a letter of 10 June the Director of Human Resources told her counsel that the Agency had tried to reach her by telephone on 21 May and in any event the Committee heard only staff members.

In its report of 16 June the Committee recommended rejecting her appeal. By a letter of 20 June 1997 the Director of Human Resources told her that the Director General had done so. That is the decision she is challenging.

B. The complainant sees serious flaws in the impugned decision. The decision of 23 August 1996 states neither the grounds for it in law nor any facts warranting action under Article 36 of the Staff Regulations, which allows dismissal of a probationer for unsatisfactory performance. The reasoning of the Joint Committee for Disputes was too general and abstract, and that shows how contrived is the Agency's charge of poor drafting. Resting as it does solely on the Committee's report, the decision of 20 June 1997 is flawed for lack of a proper explanation. The only warning she ever got that she had been found wanting was in the interim probation report, which was inchoate and which in any event she did not get until 18 July 1996, just a few days before there came the decision to dismiss her. She got only three working days in which to offer written comment on the report and that was not enough to answer such vague criticism. Scarcely a month went by from 26 July 1996, when she was told of the proposal to dismiss her, until 20 August, when the Reports Committee met; again that was not time enough for her to plead her case, the less so since she was on holiday for part of the period. The Organisation would not let her get help from counsel in pleading before the Joint Committee for Disputes. The advisory bodies did not work properly.

Her probation did not give her the opportunity of showing her mettle. She had no proper supervision while on probation. At no time did she get any clear and objective description of her duties.

Her performance and behaviour were obviously misjudged, and she rebuts the strictures on that score.

Because of a "power struggle" between other members of the unit to give her duties to someone else there was abuse of authority.

She seeks the quashing of the decision of 20 June 1997 rejecting her appeal and of the decisions of 23 August 1996 terminating her appointment and forbidding her to stay on until she had served the period of notice. She claims payment of 7,593,480 Belgian francs in material damages, the amount she would have earned in the five years of her appointment; of the same amount to cover another five years' appointment; of 2 million francs in damages for disruption of her studies; of 12 million for "breach of contract with the European Commission"; of 30 million for harm to her career; and of 1 million in costs. She claims moral damages in the amount of 10 million francs for her "summary eviction" from the Organisation's premises and another 20 million for injury to her health.

C. In its reply the Organisation submits that it did properly account for its decisions of 23 August 1996 and 20 June 1997. The earlier one cited the Reports Committee's report and the later one the report of the Joint Committee for Disputes, and both reports were duly reasoned. The complainant was told orally at the meeting of 17 July 1996 of the criticisms of her work. So she knew – and her comments of 23 July bore it out – that the main fault her supervisors found was poor drafting. Besides the interim probation report of 18 July 1996 several electronic mail messages from them took her to task for both attitude and work. She got all the time she needed to ready her case. The reason why the Joint Committee wanted to hear her and not her counsel was that her case turned on issues of fact, not of law.

Whatever might have helped her to make good her shortcomings, a detailed description of her duties would not. None of her tasks demanded skills beyond those of a specialised journalist.

As for her charge of misjudgment, her supervisors found her so unpromising that they thought further probation pointless. The Reports Committee and the Joint Committee agreed. So by many objective tests she looked unlikely ever to measure up. She shows no abuse of authority.

The breaking-off of probation was not actionable. Her claims to damages are "highly fanciful and exorbitant". Eurocontrol asks the Tribunal to award the costs of the case against her.

D. The complainant enlarges on her pleas in her rejoinder. She submits that the Joint Committee meant at the outset to hear her and was not free to change its mind on the grounds that her counsel had applied for adjournment. She rebuts the Organisation's criticisms of her. The abuse of authority is to be seen also in its delay over meeting in full the medical costs she ran up while on probation. She raises to 2 million francs the amount she claims in costs.

E. The defendant presses its pleas in its surrejoinder. It cites the Joint Committee's view that the written evidence sufficed. Its inviting her to appear did not imply that hearing her was "indispensable". What she says in her attempt to show abuse of authority is irrelevant to this case.

CONSIDERATIONS

1. The complainant started a career as a freelance journalist in 1981. In 1983 she got a degree in journalism and communication and in 1984 a postgraduate diploma qualifying her to teach those subjects in French-speaking secondary schools in Belgium.

Eurocontrol held a competition to fill a post for an editor at grade B4/B5. The complainant entered it and won: on 1 April 1996 the Agency appointed her for five years as administrative assistant at grade B4. For the first nine months she was to be on probation.

Article 36 of the Staff Regulations reads:

> "1. Officials other than those in Grades A1 and A2 shall serve a probationary period before they can be established. The probationary period for officials in Category A, the Language Service and Category B shall be nine months and six months for other officials.
>
> However officials falling under the Air Traffic Flow Management Service may only be established where the duration of the period of training is at least as long as 9 months. If the period of training is shorter, it must be supplemented by a probationary period equal to the difference between nine months and that period.
>
> When the training has not been completed after 9 months, establishment will be postponed accordingly until the official has finally completed his training.
>
> Where during his probationary period an official is prevented, by sickness or accident, from performing his duties for one month or more, the appointing authority may extend his probationary period by the corresponding length of time.
>
> 2. Not less than one month before the expiry of this probationary period, a report shall be made on the ability of each probationer to perform the duties pertaining to his post and also on his efficiency and conduct in the service. This report shall be communicated to the probationer, who shall have the right to submit his comments in writing. An official on probation whose work has not proved adequate for establishment in his post shall be dismissed.
>
> In the event of patent inaptitude of the probationer a report may be drawn up at any time during the probationary period. This report shall be communicated to the person concerned who shall have the right to comment in writing. On the basis of this report the appointing authority may decide to discharge the official on probation

> before his probationary period expires subject to one month's notice. In such cases the duration of service shall not exceed the normal probationary period.
>
> Unless the official on probation is able to resume his duties with his parent administration immediately he shall receive compensation equal to two months' basic salary if he has completed at least six months' service and to one month's basic salary if he has completed less than six months' service.
>
> The provisions of this paragraph do not apply to an official who resigns before expiry of his probationary period."

The Agency assigned the complainant to the section for External and Public Relations. Her first-level supervisor was Mrs. Lynn Koch, the assistant to the head of the section. One of her duties was to draft texts for internal use or for outside publication. The head of section and Mrs. Koch were both English-speaking, and Mrs. Koch also had good French. The complainant and her supervisors sent each other many electronic mail messages. She has accused them of not keeping in close enough touch. But the Agency denies the charge, and it is not proved. There is no evidence to suggest that her supervisors ever refused to see her or answer her questions. The mass of e-mail messages shows that Mrs. Koch kept a close and careful watch on her and gave her constant tips on how to go about her work. One example is the following e-mail on 8 May 1996:

> "I am pleased that you managed to complete the task today, in spite of your misgivings.
>
> However, I find the presentation of the whole slipshod and the contents leave a lot to be desired. I have perhaps been remiss in not bringing equivalent shortcomings to your attention before now: I had hoped that these faults could be ascribed to your being new in the Organisation and that you would overcome them in time. You have now been with us for over a month and your carelessness in such matters can no longer be tolerated with equanimity.
>
> To restrict my comments to this package:
>
> The photographs present a good selection but the captions are very poor. Not only has the black ink you used to write with smudged the surface of some photos but the information is much too scanty. Please arrange for labels to be printed containing full information - the name EUROCONTROL must appear on each label; all acronyms must be given in full; "siège" and "salle ops" is not good enough: please be more precise - and as the request came to us in English, give the captions in English.

> The list of Member States ought to be re-typed and properly headed; in its current presentation, a photocopy of the back page of a press release headed "Note To Editors", it is confusing.
>
> The information contained in your typed version of "EUROCONTROL in Brief" contains several serious inaccuracies which I have marked and the information I asked you to update on the CFMU is repetitive in style. Please correct the inaccuracies and improve the style of your addition.
>
> I find it rather primitive simply to highlight the first sentence of the CFMU/Italy information: attach a note explaining the context.
>
> Please produce a properly presented cover page for both the graphics, explaining what they are, and for the selection of press releases.
>
> Where is the draft covering letter for Mr Petrou's signature indicating that this selection of information had been prepared and that it will be sent under separate cover?
>
> I understand you did this in a rush, but the quality of the work need not betray this fact. We pride ourselves on providing a high-quality service - on time. Strive to bear this in mind."

The complainant's supervisors did not care for her drafts in French and passed some of them on to the language service, which revised them fairly heavily.

2. Her supervisors felt that her poor performance warranted an interim probation report, which would afford an opportunity of talking with her about her shortcomings and serve as a warning that she must improve.

By a memorandum of 15 July 1996 the Human Resources Directorate called her to a meeting on the 17th about completing the interim report.

At the meeting two supervisors showed her the draft text and explained it. It described as "unsatisfactory" her "Aptitude for the post", "Output", "Behaviour in the service", "Relations with colleagues" and "Punctuality" and as "satisfactory" her "General appearance". Under the heading "Special aptitudes" it said:

> "The post requires perfect command of one language and good mastery of the other.
>
> Good time-keeping skills and productivity are a must. In non (sic) of these areas has the present incumbent proved satisfactory."

The main topic talked about was her poor drafting in French. She remonstrated at all their criticisms. The upshot was that her supervisors asked the Director General whether there was any point in keeping her on probation or she should just go. They let her have a summary record of the meeting and a copy of the probation report signed on 18 July 1996. They gave her until 23 July to comment in writing.

She wrote an eight-page memorandum commenting on both report and meeting. It was a wretched text: the spelling, choice of vocabulary, punctuation and syntax were poor, and some sentences made no sense. As for the content, she still brooked no criticism and made out that from the start her two supervisors had been oddly hostile to her. She asked for a meeting of the Reports Committee.

The Committee reported on 21 August 1996. It saw nothing wrong with the way in which she had been treated while on probation. In answer to her arguments it said:

> "As for proficiency in her mother tongue, which is French, the texts she has herself provided betray spelling, grammar and syntax below par. Her English is no better, as the test she took at the job interview shows.
>
> The Committee sees no likelihood of improvement by the end of the period of probation."

It came to the same conclusion about the other criticisms of her and so recommended ending both her probation and her appointment on 1 September 1996.

The Deputy Director General and the Director of Human Resources saw her at her own entreaty. The secretary of the Staff Committee went with her and asked them to let her serve her full probation. He hinted that it was not her own poor performance, but the "dishonourable intents" of others that had prompted the dispute.

Not but what on 23 August 1996 the Director of Human Resources told her on the Director General's behalf that, with due notice, her appointment would end at 1 October 1996.

With help from her counsel she filed a "request" challenging that decision with the Director General. The gist of it was that she was objecting to the criticisms: if the Agency wanted more from her it should have given her better guidance and supervision. It gave her no proper oral or written warning before termination. The real reason for the termination was that her two supervisors disliked her: they had been against appointing her and wanted to settle a score by getting rid of her.

On 4 June 1997 the Joint Committee for Disputes recommended rejecting her "complaint". Commenting on her skills and fitness for her duties, it found her French style, vocabulary, grammar and syntax unsatisfactory: if her job application and her memorandum of 23 July 1996 were anything to go by, she was "not given to checking her own work, which showed all sorts of careless blunders". She was "no hand at writing". The corrections by the language service had not prompted her to do any better. "Since some of her work is intended for senior diplomatists and politicians her shortcomings could badly harm the Organisation's standing". The Joint Committee found nothing wrong with the probation procedure or dismissal procedure.

On 20 June 1997 the Director of Human Resources rejected her "complaint" on the Director General's behalf.

3. That is the decision she is asking the Tribunal to set aside, together with the termination of 23 August 1996 of her appointment and the decision of even date forbidding her to serve the period of notice, both of which she sees as unlawful. Though she does not seek reinstatement, she claims awards of damages. She pleads procedural flaws: the Agency failed to explain its decisions and denied her due process. On the merits she submits that the Agency's criticisms of her were empty; some of her work was not up to her to do; she got no proper guidance or written or oral warning; the charge of poor drafting was flimsy and fanciful, and trumped up as a pretext for dismissal; there was no ostensible reason for prematurely ending her probation.

The Organisation seeks dismissal of the complaint as devoid of merit.

4. The complainant asks to have struck from the records the synopsis headed "Tasks given by Lynn Koch to F. Jassogne" which the Organisation has appended to its reply.

That text is to be treated, not as an item of evidence, but as a statement by the defendant and as such may remain in the case records.

5. A consistent line of precedent - see, for example, Judgment 1418 (*in re* Morier) under 6 - has it that a decision not to renew a staff member's appointment is discretionary and will be set aside only if it is *ultra vires* or breaks some rule of form or of procedure, or rests on a mistake of fact or of law, or overlooks a material fact, or draws a clearly wrong conclusion from the evidence, or discloses abuse of authority. The Tribunal will be particularly cautious in reviewing a decision not to confirm the appointment of a probationer; otherwise probation would fail to serve as a period of trial. The purpose of probation is to ensure that new staff members are the best qualified. So an organisation must be allowed the widest discretion in the matter and its decision will stand unless the flaw is especially serious or glaring. Moreover, where the reason for refusal of confirmation is unsatisfactory performance, the Tribunal will not replace the organisation's assessment with its own. The same precepts hold good for termination of probation before the end of the prescribed period: see Judgments 1736 (*in re* Seim) and 1753 (*in re* Vitry). The Tribunal does not thereby narrow its review of issues of law: its cautiousness is confined to matters of discretion.

The reasons for the decision

6. A staff member needs to know the reasons for a decision so that he can act on it, for example by challenging it or filing an appeal. A review body must also know the reasons so as to tell whether it is lawful. How ample the explanation need be will turn on circumstances. It may be just a reference, express or implied, to some other document that does give the why and wherefore. If little or no explanation has yet been forthcoming, the omission may be repaired in the course of appeal proceedings, provided that the staff member is given his full say.

Here the decision under challenge is the one rejecting the "complaint", and it states the reasons plainly enough by citing, for one thing, the report of the Joint Committee for Disputes. That report made no bones about it: the complainant's probation should be ended because her drafting in French was poor and unlikely to come up to standard by the expiry of the ordinary period of probation. For a precedent see Judgment 1127 (*in re* Verlaeken-Engels) in 15 to 18.

Besides, the Director General's original decision had already given her those reasons.

Though she further contends that the reasons were wrong the plea goes rather to the merits.

7. She argues that, not knowing what exactly the Agency's criticisms were, she could not plead her case properly before the decision to terminate her appointment was taken.

The case law says that an organisation may not take unilateral action that affects status before giving the staff member the opportunity of answering: see Judgment 1484 (*in re* Thuillier) under 8, and the others cited therein. And that rule applies, of course, to dismissal of a probationer.

But here there was no breach of it.

Termination was spoken of at the meeting of 17 July 1996 after she had denied all the criticisms of her; the summary record of the meeting confirmed the possibility; and it was again mooted by the Reports Committee and at the meeting with the Director General's representatives.

The nature of the criticisms, too, was quite clearly explained to her, in particular at the meeting of 17 July 1996, and the memorandum she wrote in reply shows that she knew full well what they were: poor drafting in French, among others. In her rejoinder she admits to having known that the language service had corrected some of her texts, and with her memorandum she submitted samples.

She fails too to show that she got too little time to comment. Though not given much, she did not, as she might, ask for more, there is no reason to think it would have been refused: see again Judgment 1127 under 6. She says that she was on holiday and that some papers were in her office to which she was not sure of access. But she failed to say so at the time and she fails to show now that her defence was thereby hampered.

8. She pleads breach of her right to a hearing in the refusal to let her counsel address the Joint Committee for Disputes, though counsel wrote and signed her "complaint" of 22 November 1996.

By a letter of 28 May 1997 the Committee told her that it would hear her on 4 June. Her counsel asked for adjournment on the grounds that he was busy and she had to sit university examinations that month. The Director of Human Resources replied that the Agency had tried to reach her earlier and that the Committee heard staff, not counsel. The complainant failed to turn up on 4 June 1997 and the Committee dropped the idea of hearing her.

Judgment 995 (*in re* Agbo) commented under 5 on a requirement in the statutes of the appeals board of another organisation that an appeal be lodged by the appellant or by a member of headquarters staff; it said that, being "in mandatory and limitative terms", that requirement had to be observed even if it "would not be admissible before any court of law". The Tribunal ruled likewise on a case where counsel had been barred altogether from the internal appeal proceedings in Judgment 1610 (*in re* del Valle Franco Fernandez), under 12, and in Judgment 1763 (*in re* González-Montes), under 10, on a case where counsel had not been admitted to hearings. In Judgment 1673 (*in re* Cabral No. 2) the Tribunal discussed, in 5, how far rules of judicial procedure should apply to internal appeals.

Here Eurocontrol let counsel draft the complainant's briefs and that is what mattered most. She does not even make out that she had any right to be heard. The Committee's intention was merely to hear her answer a few questions, but when she failed to appear it let the matter drop. She does not say that she suffered on that account, or show that she was prevented from attending.

The conclusion is that the internal appeal proceedings disclose no breach of any general principle of law. It is only reasonable that the arrangements should not be so hard-and-fast as for judicial process, and only as to a lesser issue was help from counsel barred. Since in the end there were no hearings anyway the absence of her counsel simply did not matter. Her plea fails.

9. The complainant pleads flaws in the proceedings before the advisory bodies.

(a) In her submission one member of the Reports Committee had been on holiday and so did not see her comments until 20 August 1996, the day before the Committee met. Be that as it may, he was unlikely to need a whole day to go through them, and on that score there is no reason to suppose that the Committee was remiss.

(b) The complainant says that she was not told beforehand the names of the Committee's members. But she neither denies learning them later nor makes out that she had any grounds for objection.

(c) She alleges that one member wrote scathing remarks against her comments on the probation report.

The defendant's answer is that it was the language service that wrote the remarks, and the complainant does not disprove it.

(d) She accuses a member of the Joint Committee for Disputes of behaving improperly in advising her to answer the criticisms in the first draft of the probation report and then using her answers against her.

She fails to show that that member did anything but advise her to comment on the criticisms. That did not mean "reversing the burden of proof". There was nothing wrong with giving advice of that kind, and she offers no convincing reason why the Committee member should have stood down or not looked at her comments.

(e) Citing the rules, she contends that no-one may serve on both the Reports Committee and the Joint Committee and that it was a breach of the rules for the two to have the same secretary.

The plea fails: the rules say nothing of the secretary, who does not express views anyway.

The merits

10. An organisation has broad discretion both in determining its own needs and in saying whether someone is fit for employment, and in such matters the Tribunal has only a limited power of review.

(a) The Director General agreed with the Reports Committee and the Joint Committee that the complainant's duties called for the skilful drafting of texts for outside publication and that the Organisation's good name largely depended on their quality. What was wanted was someone who could single-handed turn out polished texts that needed no checking by the language service.

(b) The Director General also agreed with the Committees that, to judge from some of the texts gone over by the service, her drafting in French was not up to the mark.

On neither count did he exercise his discretion wrongly. Of course an organisation may demand fine writing, and the finding that she fell short is beyond reproach. Even her lengthy comments of 23 July 1996 on the draft probation report revealed not only shaky spelling, punctuation, vocabulary and grammar but a muddy style. Those faults are the more striking for appearing in the very text she intended to rebut the main criticism of her: dismal French.

11. Poor performance does not warrant ending a probationary appointment unless there is some hope of reasonably early improvement, usually by the expiry of the probation.

(a) Before dismissing someone on the grounds of performance an organisation must ordinarily give fairly prompt warning so as to allow of improvement. But all that is needed is that the staff member be aware of the risk of dismissal and of the need for improvement. If the staff member still proves unsatisfactory, dismissal will be in order even if founded on new shortcomings that are not the same as those that prompted the warning: see Judgment 1546 (*in re* Randriamanantenasoa) under 18. And again those rules hold good *mutatis mutandis* for ending probation: see Judgments 1212 (*in re* Schickel-Zuber) under 3 and 4; 1246 (*in re* Pavlova Nos. 1 and 2) under 14; and 1386 (*in re* Bréban) under 21.

By an e-mail message of 8 May 1996 Mrs. Koch did send the complainant a fairly strong warning that she was not coming up to the high standards that the section set.

(b) But was that warning enough, coming as it did in the early days of her probation, and considering the Organisation's duty to groom a probationer?

For the following reasons there is no need to rule on that issue.

A warning will serve no purpose at all if the probationer is obviously unwilling or even unable to heed it: see Judgment 453 (*in re* Heyes) under 5 and 6. That was Eurocontrol's view in this case. When warned of her failings the complainant took a hostile stance and would not hear of them. Nor has she since appeared any more docile in her comments, in her internal appeal or, for that matter, in her present suit. The defendant inferred that she would never acknowledge her own shortcomings or even try to do better and was therefore unlikely to show enough improvement by the end of probation.

To a large extent the Director General had discretion to form such an opinion of the complainant's personal attributes; he did not commit any obvious abuse of it, and her pleas on that score cannot succeed.

She contends that she could not acquiesce in any of the criticisms because they were unfounded. She thereby ignored what was quite obvious: her French texts were below par.

She argues that it was unfair, and indeed in breach of due process, to hold her attitude or her texts against her because she was merely acting in her own defence. But what a litigant may say in exercise of free speech does matter: the defendant was entitled to take account of anything the complainant said in the course of the proceedings that might have a bearing on the merits of her case.

She knew full well what improvements her texts needed. Even if she wanted to challenge the criticisms, she might readily have attempted to rise to her supervisors' expectations. She never did.

12. She submits that the criticisms and the termination were unwarranted because the Agency failed to discharge the duty it owed her as a probationer and so blighted her hopes of success: it gave her duties other than the proper ones, which, for want of a job description, she takes to be those set out in the notice of competition; her supervisors failed to give her the help and attention any probationer needs; she had not enough training; and the methods of work were inadequate.

The Agency rebuts her arguments. It contends that it was from her performance of specific tasks forming part of her duties that her shortcomings became apparent. Her supervisors did give her constant attention, tips and criticisms, not just by e-mail but often orally.

Her objections to working methods are misconceived: it is for the Organisation to follow the methods it likes. A job description would have served no purpose since it was the performance of set tasks that was her undoing. But what matters most is that she was told time and again that skill in writing French was expected of her. So her comments on that score are immaterial.

13. She pleads abuse of authority: unmindful of the Agency's interests, her supervisors had her thrown out because they had never wanted her in the first place.

Though the burden of proof is hers, she has failed to discharge it. Besides, it was not her supervisors who took the impugned decision but the Director General, and on the advisory bodies' recommendation at that.

The plea fails.

14. She sees breach of her rights in the oral decision by the Director of Human Resources to relieve her of serving the period of notice and order her off the premises forthwith. To her mind that was needlessly drastic and churlish: she had a right under her contract to go on working.

The Agency replies that it treated her as it usually treats people in those circumstances; she suffered no injury since it paid her; and, being released from work, she had time to study for her university examinations and look for a new job.

The holder of a contract of service is entitled, not just to receive payment, but, up to the date of transfer or dismissal, to carry out the set duties. Save where there is agreement to the contrary the organisation is bound by the contract to let the staff member work. The staff member's right to do work as well as to earn money is indeed the reason why transfer must not cause undue injury: see for example Judgment 1496 (*in re* Güsten) and the case law cited therein. But the employer has authority to tell the staff member how best to serve its own interests. So it may relieve a staff member of duty during a short period of notice provided that it no longer anticipates worthwhile services and avoids giving the harmful impression of summary dismissal.

In Judgment 1022 (*in re* Michel) the Tribunal ruled on a plea by a complainant that she had been discriminated against in that she, but not others, had had to serve the period of notice. It said in 8:

> "The main purpose of notice of termination is to protect someone who has his appointment terminated from sudden action that might put him in an awkward plight. Either he may go on working throughout the period or else he may be paid compensation in lieu. In any event there is nothing compulsory about compensation.
> It is for the Organisation as employer to determine where its interests lie."

Here the Agency scarcely explained to the complainant why she was not to work in September 1996. But it obviously saw no benefit to itself in keeping on a probationer whose work was poor. It may, too, for the reasons stated above, have thought it in her own interests that she should go.

Letting her go was tantamount to putting her on special leave, a decision it had discretion to take: see for example Judgment 1759 (*in re* Mussnig No. 4).

Again her plea is without merit.

15. Since her main claims fail, so too must the subsidiary ones.

16. Eurocontrol's claim to an award of costs against the complainant is disallowed.

DECISION

For the above reasons,

The complaint and the Agency's claim to costs are dismissed.

In witness of this judgment, adopted on 18 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

MICHEL GENTOT JULIO BARBERIS JEAN-FRANÇOIS EGLI

A.B. GARDNER

EIGHTY-SIXTH SESSION

***In re* Basile** **Judgment 1818**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Giorgio Basile against the Food and Agriculture Organization of the United Nations (FAO) on 8 December 1997 and corrected on 26 January 1998, the FAO's reply of 15 April, the complainant's rejoinder of 18 May, the Organization's surrejoinder of 29 June, the further statement of the complainant of 27 July and the comments thereon submitted by the FAO on 10 November 1998;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Italian who was born in 1938, joined the staff of the FAO in 1962 as an accounting clerk at grade G.4. He got several promotions, first to G.5 and then to G.6. He later became an accountant in the Professional category at P.1, before moving on to posts of finance officer at P.2. and P.3. In June 1991 he took up the duties of administrative officer at P.4 in the FAO's Regional Office for the Near East, in Cairo.

In March 1995, after a heart specialist had put him on extended sick leave, he wrote to the Administration asking about agreed termination and on 22 March he saw the acting senior personnel officer. The officer told him that the conditions governing such termination did not seem to apply. By a fax of 21 May 1995 to the Director of the Personnel Division the complainant tendered his resignation at 30 June 1995. In a memorandum of 22 May 1995 a senior personnel officer confirmed that the Administration was unwilling to consider agreed termination. By a letter of 25 May a personnel officer gave him notice of separation formalities, which "required [him] to have an exit medical examination within 30 days" of leaving. The letter encouraged him to have the examination at headquarters in Rome, although he might arrange for it elsewhere.

By a fax dated 26 May 1995 the personnel officer told him the Administration had accepted his resignation and that his last day of work would be 30 June 1995. On 4 and 5 July the complainant met FAO officials in Rome to discuss separation formalities but did not undergo a medical examination.

By a letter of 5 April 1996 the complainant appealed to the Director-General alleging that his resignation was invalid because he had been on sick leave on 30 June 1995 and claiming material and moral damages. In a reply of 28 June 1996 the Assistant Director-General in charge of Administration and Finance rejected his appeal on the Director-General's behalf as irreceivable and devoid of merit. By a letter dated 22 August 1996 he appealed to the FAO Appeals Committee. In its report of 24 July 1997 the Committee recommended rejecting his appeal on the merits. By a letter of 9 October 1997, which he is impugning, the Director-General endorsed the Committee's recommendation.

B. The complainant submits that the impugned decision is unlawful. He has two main pleas.

He charges the Organization with negligence insofar as it failed to conduct the end-of-service medical examination which might have afforded grounds for letting him have compensation for service-incurred illness. The poor health that dogged him up to 15 March 1996 was caused by the "unbelievable working conditions and continuous humiliations" at his last duty station. It was "stress" that made him feel that the only way to keep his health was to resign, even against his best interests.

He alleges breach of FAO Manual paragraph 323.512, which says that a staff member on sick leave at separation will have the date "extended until the end of his/her period of certified sick leave". Since the certified sick leave he was on at 30 June 1995 did not end until 15 March 1996, that is the date at which his separation should have taken place.

He is seeking awards of 450,000 United States dollars in material damages and $200,000 for moral injury. He claims reinstatement "in the FAO payroll" from 1 July 1995 to 15 March 1996.

C. In its reply the FAO observes that the Appeals Committee should have declared his appeal time-barred. It contends that his complaint is unfounded inasmuch as he resigned of his own free will, in full awareness of the consequences and at the date of his own choosing. He acted under no pressure from the Organization, and there was no reason for it to compensate him for having chosen to resign. In any event, he has adduced no evidence to suggest that undue stress at the office damaged his health. Though the FAO invited him in his own interest to have the medical examination it could not force him to do so.

There was no breach of FAO Manual paragraph 323.512, the purpose of which is to protect staff members on sick leave against involuntary separation. The paragraph about voluntary resignation is 314.7131. Since it allows for voluntary resignation during sick leave, it was proper for the Organization to honour his wishes.

D. In his rejoinder the complainant seeks to refute several points in the FAO's reply. He says he gave "full evidence" of his supervisors' ill treatment of him. In the absence of any medical examination, how could the Organization rule out the possibility that his faculties were impaired at the material time? As to duress, he has produced ample proof of the "psychological pressure" he was under. Whenever there is a clash between the rules an organization has a duty to apply the provision most favourable to the staff member.

E. In its surrejoinder the FAO produces records from the medical service showing that the complainant had consultations there in March and April 1995. The FAO deduces from his medical file that his illness might be due to causes that had nothing to do with work.

F. In a further brief the complainant expresses surprise at the FAO's producing those records only with its surrejoinder. He points out that they go back to 1991; that the last check-up he had at the FAO was in that year; and that entries for 1995 are just "notes for the records".

G. In further comment the defendant says that it was the complainant's "continued negation" that prompted it to produce the records. It presses its pleas.

CONSIDERATIONS

1. The complainant joined the staff of the FAO in September 1962 as an accounting clerk at grade G.4. The Organization granted him several promotions. In June 1991 it transferred him to its Regional Office for the Near East, in Cairo, as an administrative officer at grade P.4.

2. On 17 March 1995, while at headquarters in Rome, he sent a memorandum to the Assistant Director-General in charge of Administration and Finance asking whether he might be granted "agreed termination" of his appointment, but the acting senior personnel officer told him orally on 22 March that the answer was no. In a fax letter of 21 May 1995 he tendered his resignation at headquarters at 30 June 1995 on grounds of health. In that letter he observed that he would be on sick leave until 11 June 1995 and he sought "special approval" of his resignation at 30 June "without any deduction from [his] annual leave to cover the balance of the required notice period". He later sent from Cairo another certificate, dated 6 June 1995, by a doctor prescribing one month's rest and treatment, i.e. up to 6 July.

3. The Organization accepted his resignation by a fax message of 26 May 1995. A personnel officer at headquarters wrote to him the day before about the formalities of "separation" and said, among other things, that he must undergo an "exit medical examination" within thirty days of separation. He travelled to Rome on 30 June and there had interviews with several people about the formalities. But he did not undergo the medical examination.

4. On 5 April 1996 he lodged an appeal with the Director-General alleging that his resignation, separation and removal from the payroll were invalid because he had been on sick leave at 30 June 1995. On 28 June 1996 the Director-General dismissed his appeal as both time-barred and devoid of merit, and he appealed to the Appeals Committee on 22 August 1996. In its report of 24 July 1997 the Committee gave him the benefit of the doubt on the issue of receivability but on the merits found no reason to believe that he had been subject to threats or pressure to force him to resign against his will; in resigning he had, the Committee held, been "fully cognizant of his action". In a letter to him dated 9 October 1997, which is the impugned decision, the Director-General accepted the Committee's recommendation and rejected his appeal.

5. The relief which the complainant is seeking is a total award of 650,000 United States dollars – made up of 450,000 for material injury and 200,000 for moral injury – and reinstatement "in the FAO payroll" from 1 July 1995 to 15 March 1996.

The validity of the complainant's resignation

6. He alleges that "unbelievable" conditions and "humiliations" at work in Cairo caused his illness, subjected him to constant stress and cast him into a "very serious state of despair" that led him "erroneously" to believe that "the only way out was to submit [his] resignation". Neither before nor after separation – he says – did any of the FAO's medical officers ever examine him, though his sufferings went on for four years.

7. The first material issue, then, is whether the complainant wrote his letter of resignation of his own free will; if he did, he may not now claim that separation was invalid.

8. In a memorandum dated 25 September 1996 the FAO's chief medical officer listed the following six sick-leave certificates that the complainant had supplied before leaving at the end of June 1995:

one dated 12 February 1995 and issued in Cairo, for three days;

one dated 20 March and issued in Rome, for twenty days;

one of even date issued in Rome by a cardiologist, for an unstated period;

one issued in Rome on 5 April, for sixty days;

one made out on 6 April in Rome by the same cardiologist for sixty days; and

the one issued in Cairo on 6 June 1995 – and mentioned in 2 above – for one month.

The chief medical officer commented:

> "The medical certificates from 2 different physicians in Rome and the doctor in Cairo state, as diagnoses: 'hypertensive crisis to be determined; recurrent angina-like episodes to be determined, hypertension, vertigo; hypertensive crisis accompanied by suspected myocardial ischaemia; ischaemic heart disease'."

He said that the complainant had seen him on 21 March 1995 and a colleague on 6 April and he concluded, both from the medical certificates and from those consultations, that the complainant had been "fully conscious and without signs of impaired thought process" and "the condition he suffered from at the time was not at all of a psychiatric nature".

9. To the complainant's assertion that no FAO doctor ever examined him the Organization replies by producing an attendance sheet showing that he consulted the chief medical officer on 21 March 1995 and the colleague on 6 April 1995. The Tribunal is satisfied on that evidence that he did have such consultations.

10. It appears, however, from his rejoinder that the point he is making is that neither doctor actually examined him. He says that his latest laboratory tests and medical examination went back to 24 May 1991, and in support of that statement he cites a form recording a periodic medical examination at that date. But his argument fails: the chief medical officer was entitled, even in the absence of such tests, to found his opinion of the

complainant's condition on the medical reports, consultations and his own observation.

11. It is common ground that the complainant was suffering from a heart ailment. The many charges he makes in seeking to explain why he was are irrelevant. The only material issue is whether his letter of resignation was an act of free will. And he has utterly failed to adduce evidence to suggest that his illness so impaired his faculties as to preclude treating his letter of resignation as such.

The date of separation

12. Secondly, the complainant cites Manual paragraph 323.512, which reads:

> "If a staff member is on certified sick leave on the date of separation the effective date of separation will be extended until the end of his/her period of certified sick leave."

He says that "separating" him while he was on "certified sick leave" was in breach of that paragraph. Since he did not recover from his illness until 15 March 1996, that, and not 30 June 1995, was the date at which separation ought to have taken effect.

13. The material rules are Staff Rule 302.9053, which reads:

> "The Director, Personnel Division may accept resignations on shorter notice or waive the requirement completely. If a resignation is submitted without such notice, a deduction is made from accumulated annual leave to cover the remainder of the required notice period."

and Manual paragraph 314.7131, which provides:

> "If a staff member resigns during a period of sick leave or of annual leave taken for illness extending beyond his/her sick leave entitlement, the effective date of separation cannot be made retroactive but otherwise is that requested by the staff member concerned, provided (i) that it falls within the period covered by the allowable leave, and (ii) that the staff member submits a medical certificate confirming his or her inability to return to duty before the end of such leave."

14. The Organization submits that, though it may not terminate the appointment of someone on certified sick leave, or let a fixed-term

appointment expire until sick-leave entitlements have been exhausted, there is nothing to prevent the staff member from choosing to resign in accordance with 314.7131 and thereby surrendering his right to stay on sick leave.

15. The purpose of Manual paragraph 323.512 is to protect the staff member against termination in the course of sick leave. But 314.7131 contemplates resignation during such leave. Since the Organization was able to meet the complainant's wishes and let him have voluntary separation, paragraph 323.512 does not apply. There are therefore no grounds for allowing his claim to holding the date of separation over to 15 March 1996.

DECISION

For the above reason,

The complaint is dismissed.

In witness of this judgment, adopted on 13 November 1998, Mr. Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

A.B. Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Registry's translation,
the French text alone
being authoritative.

EIGHTY-SIXTH SESSION

***In re* Tissot** **Judgment 1819**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Albert Félicien Tissot against the Interim Commission for International Trade Organization/General Agreement on Tariffs and Trade (ICITO/GATT) on 3 January 1998 and corrected on 24 February, the Interim Commission's reply of 7 May, the complainant's rejoinder of 5 June and the defendant's surrejoinder of 1 July 1998;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant is a French citizen who was born in 1939. In 1965 he joined the staff of ICITO/GATT – the "Interim Commission" – in Geneva as a messenger at grade G.1. He later moved to the Technical Services and Buildings Unit as a technician. He there reached grade G.6.

On 1 July 1993 he suffered an injury while doing carpenter's work. It left him with a permanent disability in his left hand and he had to be transferred to other duties as a sound technician.

By a letter of 13 December 1994 to the Director of the Personnel Division he asked "how GATT would be discharging its liability and what course it had in mind to work out a fair settlement". In a memorandum of

16 December 1994 the Director acknowledged that the accident had been service-incurred and so "warranted an award of compensation under Appendix D" to the Staff Rules of the United Nations (which apply *mutatis mutandis* to the staff of the Interim Commission); to set the amount the Joint Medical Service of the United Nations in Geneva would be in touch with his own doctor.

Article 11.3(a) of Appendix D says that in the case of "injury ... resulting in permanent disfigurement or permanent loss of a member or function, there shall be paid to the staff member a lump sum, the amount of which shall be determined by the Secretary-General" according to the schedule in 11.3(c). The schedule sets the award for loss, or total loss of use, of a limb or function at a percentage of an amount equal to twice the annual pensionable remuneration applicable to grade P.4, step V. For staff in the General Service category the executive head may, still under 11.3(c), adjust the amount of compensation set in the schedule "taking into account the proportion which the staff member's salary or wage bears to Headquarters rates".

In a letter of 27 October 1995 to the Director of the Personnel Division the complainant said that he wanted to know the outcome of the memorandum of 16 December 1994 and that he had undergone check-ups by a surgeon at a hospital at Annecy, in France, and by a neurologist at the university hospital of Geneva.

There followed talks between him and management about the possibility of his taking early retirement at the end of 1996; he would get special unpaid leave covering the whole of that year and an award of 12 months' pay in compensation. But nothing came of the talks.

The findings of the check-ups were that he was suffering from 25 per cent permanent disability. On 6 May 1996 the Interim Commission offered him 41,075 United States dollars in compensation. He accepted the amount, though he objected to the reckoning of it.

In a letter of 14 May 1996 he asked the Deputy Director-General to sort out the dispute with Personnel over the construction of Appendix D and to put the case to the Joint Appeals Board.

In a memorandum of 22 May 1996 Personnel explained to him how the Interim Commission had reckoned the amount due under Article 11.3(c) of

Appendix D: it had taken the figure of 25 per cent loss of function and applied that percentage to a sum equivalent to twice the yearly amount of pensionable remuneration at grade P.4, step V.

In a letter of 31 May 1996 to the Deputy Director-General he said that 11.3(c) empowered the executive head to raise the amount in the schedule; he asked that he should in time benefit under 11.2(d) too, which provided for compensation for loss of earning capacity for any staff member partly disabled at the time of termination.

In a memorandum of 19 August 1996 Personnel told him that the amount in the schedule held good and that for anyone still on the staff it was too soon to claim compensation for loss of earning capacity.

In a letter of 11 November 1996 to the Director-General he argued that the amount of his compensation had been worked out as if he were in New York, whereas 11.3(c) required taking account of disparities in pay between Geneva and New York. He asked for review of the reckoning.

In a letter of 18 November the Director-General confirmed the decision of 6 May.

On 12 December 1996 the complainant asked that the dispute over the reckoning be put to the Joint Appeals Board. In a report of 4 September 1997 the Board recommended review of the decision of 18 November 1996 on the grounds that "where, as here, rights and liabilities turn on a rather hard job of interpretation, Personnel should have either made up its own mind about how to construe 11.3(c) or, failing that, recommended any construction to the staff member's advantage that did not offend against some overriding interest of the Commission's".

By a letter of 8 October 1997, the decision now impugned, the Director-General again upheld the decision of 6 May 1996.

B. The complainant submits that in reckoning the compensation due to him the Interim Commission failed to act under Article 11.3(c) of Appendix D and put up the amount. He wants it to do so.

Secondly, he claims the payment as from 1 December 1997, the date of termination of his appointment, of compensation under Article 11.2(d) of Appendix D for his loss of earning capacity.

He explains that he meant to go on working as a carpenter after retirement by doing up old furniture and had built up a big stock of wood for the purpose. That would have been his main source of extra income, but he has had to drop the idea.

He is claiming damages under all heads of injury.

C. In its reply the defendant points out that the amount it paid the complainant in compensation on 8 October 1997 covered loss of function. As to the reckoning of it, although any adjustment must take into account the proportion which the staff member's pay bears to headquarters rates, the Interim Commission has its headquarters in Geneva and not, like the United Nations, in New York, and so the United Nations Staff Rules must be construed to suit its own needs.

Since the intent of 11.3(c) is to bestow the same compensation on anyone who may have suffered the same loss of function, whatever the duty station, and since all employees of the Interim Commission are at headquarters in Geneva, they must get the same amount in compensation for the same loss of function. And there are no valid grounds anyway for raising the amount due to someone in the General Service category: for one thing, pay is at Geneva rates so that comparison with headquarters rates makes no sense, headquarters being in Geneva; for another, 11.3(c) cannot mean that someone in that category is to fare better than staff in other categories at the same duty station.

In answer to the complainant's second claim – to compensation for loss of earning capacity – the defendant submits that it is irreceivable. He did not make it until 28 November 1997 and it was refused on 18 December 1997. He did not challenge that refusal in internal appeal proceedings and so has failed to meet the requirement of Article VII(1) of the Tribunal's Statute.

Besides – says the defendant – the claim is devoid of merit. Under 11.2(d) compensation is due for loss of earning capacity only if disability leads to termination of appointment. If the staff member can still work for the organisation it is better that he should. Even were that not so, the complainant took early retirement on 1 December 1997 under an agreement which he struck with the Interim Commission on 31 October 1997. The pension he is thus entitled to draw must be deemed to include any compensation that may be due to him for partial incapacity for work.

D. In his rejoinder the complainant enlarges on his pleas about the reckoning of the compensation.

In answer to the defendant's objections to the receivability of his second claim he submits that he could not make it while still on the staff. So indeed did he learn from the Director of Personnel's letter of 19 August 1996 and such was the Joint Appeals Board's view in its report of 4 September 1997.

On the merits he contends that his termination did take the form of dismissal, and that it was at his own request and in line with the Staff Regulations and with the interests of both sides. As for the amount of the compensation he got on leaving, it was reckoned, not on the strength of the consequences of the accident, but in keeping with the Interim Commission's practice in the event of early retirement.

E. In its surrejoinder the defendant presses its pleas on both claims.

CONSIDERATIONS

1. The complainant, a French citizen, was born on 19 February 1939. He joined ICITO/GATT on 23 October 1965. His appointment ended on 30 November 1997 when, by agreement between both parties, he took early retirement.

A clause in his contract of service, which was regularly renewed, read:

> "This appointment is subject to the following conditions and governed by the provisions of the Staff Regulations and Rules of the United Nations, as applied to the staff of ICITO."

He was employed in the General Service category. He began at grade G.1 and rose to G.6. He was in the Technical Services and Buildings Unit. He did carpentry, among other things.

On 1 July 1993 he had an accident at work and injured his left hand. Despite treatment he was left with a permanent partial disability. He could no longer work as a carpenter and had to move to other duties.

There were discussions and, from him, objections about the award of compensation for the accident and disability.

2. By a decision that the "Contracting Parties" took on 3 December 1970 the Interim Commission declared the United Nations Staff Regulations and Staff Rules to apply *mutatis mutandis* to its own staff: see Judgment 380 (*in re* Bénard and Coffino) under 5.

According to Staff Rule 106.4 staff members "shall be entitled to compensation in the event of death, injury or illness attributable to the performance of official duties on behalf of the United Nations, in accordance with the rules set forth in Appendix D".

Under Article 11.3(c) of that appendix a staff member is entitled to compensation for loss of function as corresponds with the degree of disability applied as a proportion of twice the annual pensionable remuneration at grade P.4, step V. At the material time that figure was 82,150 United States dollars. Since the complainant's disability was found to be 25 per cent the amount he got came to a quarter of twice that figure, or $41,075. That particular reckoning is not at issue.

But 11.3(c) further provides:

> " In the case of General Service personnel, manual workers and locally recruited mission personnel whose salaries or wages are fixed in accordance with staff rules 103.2, 103.3 or 103.4, appropriate adjustments in the amounts of compensation provided for in this schedule may be made by the Secretary-General, taking into account the proportion which the staff member's salary or wage bears to Headquarters rates."

Relying on that rule, the complainant claims adjustment of the amount of compensation on the grounds that the term "headquarters" means United Nations headquarters in New York. The defendant replies that the text must be taken to refer to its own headquarters, which are in Geneva, and that because that is where the complainant was employed no adjustment is due.

Having exhausted his internal means of redress, the complainant has raised that issue in his complaint to the Tribunal.

3. Article 11.2(d) of Appendix D reads:

> "Where, upon the separation of a staff member from United Nations service, it is determined that he is partially disabled as a result of the injury or illness in a manner which adversely affects his earning capacity, he shall be entitled to receive such proportion of the annual compensation provided for under article 11.1(c) as corresponds with the degree of the staff member's disability, assessed on the basis of medical evidence and in relation to loss of earning capacity in his normal occupation or an equivalent occupation appropriate to his qualifications and experience."

The complainant claims the benefit of that provision too.

The Interim Commission argues that on that score he has failed to exhaust his internal remedies.

It is right. The sole point at issue in the internal proceedings for review and appeal and in the impugned decision was the claim that the complainant rested on 11.3(c). In its report of 4 September 1997 the Joint Appeals Board refrained from entertaining his claim under 11.2(d) on the grounds that he was still employed and it was therefore premature. That was implied in the Director-General's decision too.

Although the complainant had already made the claim, the Interim Commission had, by the time the Board reported, said more than once that it would decide later. According to precedent such statements were not decisions on the merits against which internal appeal would lie: see Judgment 1694 (*in re* Benaïssa) under 7(c) and the others there cited.

Not until 18 December 1997 did the Interim Commission rule on the merits: it rejected the claim on the grounds that retirement meant that one stopped working. That rejection is not under challenge and indeed the complainant has failed to show that he has exhausted his internal remedies on that score.

That being so, his claim is irreceivable.

4. The only material issue, then, is whether he may have his award of compensation "adjusted" under 11.3(c) on the grounds that at his duty

station, Geneva, the cost of living is higher than in New York where the United Nations has its headquarters.

He argues that the conditions that 11.3(c) sets are met: in applying the term "headquarters" to its staff the Interim Commission must, he says, take it to mean United Nations headquarters in New York. In his submission it is only fair to put him on a par with General Service staff of the United Nations in Geneva, who might get their award adjusted. Equity requires, too, that all such staff should, whatever their duty station, get financially equivalent compensation for loss of function by adjustment of the award if need be.

The Interim Commission demurs: 11.3(c) must, it says, apply *mutatis mutandis* to its own staff, so the word "headquarters" means Geneva, not New York. In its view the rule cannot apply if the duty station is headquarters, as indeed it is for all its own staff. Besides – it goes on – the Director-General has discretion in the matter and did not abuse it by declining to act under 11.3(c).

5. (a) The Executive Secretary of the Interim Commission reported on the Executive Committee's Second Session (13 July 1948). The report said that the Executive Secretary had agreed that the United Nations Staff Rules should apply so far as possible to the secretariat of the Interim Commission.

In a paper dated 29 September 1970 the Director-General said that at least since 1958 he had been applying the Staff Regulations and Rules of the United Nations and seeking the contracting parties' approval of any departure therefrom. The chairman of the staff council had pointed that out – said the paper – and asked the Director-General to confirm that those Regulations and Rules still applied. No difficulties having arisen, the Director-General recommended no change. On 18 December 1970 the Council endorsed his recommendation .

The secretariat has been wont to apply the Staff Regulations and Rules of the United Nations insofar as they met its needs. The Director-General has also been proposing that the Interim Commission disregard any amendment made by the United Nations if it was at odds with the interests of ICITO staff or meant heavy extra costs.

The Joint Appeals Board went into the whole issue and in its report to the Director-General held that -

> "all provisions of the Staff Regulations and Rules of the United Nations apply in full, *mutatis mutandis*, to ICITO staff save where the Director-General has told the Contracting Parties of any amendment in applying them."

All that is common ground. Both parties agree that the Staff Rules apply *mutatis mutandis* to the staff of the Interim Commission. But they differ as to whether in this case the text should be adapted by taking "headquarters" to mean, not New York, but Geneva. The complainant says that it should not, the Commission that it should.

The contract that the complainant concluded with the Commission in 1965 is plain enough: it is subject to the United Nations Staff Regulations and Rules as applied to staff of the Interim Commission.

(b) Does 11.3(c) apply to General Service staff employed at the Interim Commission's headquarters?

Taken quite literally, it may, since taking account of differences in pay rates is not a condition of application but a rule that the Director-General must abide by in applying it. But such a reading would offend against the intent of the text: the term "adjustment", particularly as used in the context of pay rates, obviously means the post adjustment that is calculated to make for equal purchasing power in the pay of staff at different duty stations. Any other reading of the term would mean little since it would not fit into any other context. So the rule applies only where the staff member is not stationed at headquarters and where there is a difference in the purchasing power of pay between the duty station and headquarters. It cannot therefore apply to anyone employed at "headquarters", and the material issue is whether in this case the term means New York or Geneva.

(c) It appears from the foregoing that the Director-General has discretion to determine which provisions, if any, of the Staff Regulations and Rules to adapt; only for derogation does he have to get the contracting parties' approval.

Where the Director-General exercises his discretion only in applying 11.3(c) to a particular case the staff member cannot tell what the outcome will be. Yet that is just what was intended, and he cannot tell how the Director-General will apply any other rule either that calls for interpretation.

Where the United Nations Staff Rules refer to "headquarters", does that mean, so far as they are to apply to the staff of the Interim Commission, the Commission's headquarters? More is at stake for staff in the General Service category because their pay is adjusted, not by means of the post-adjustment allowance to the cost of living at the duty station, but according to the state of the local employment market. So it stands to reason to take as the point of comparison the place where the Commission has its headquarters, and which is in this case also the duty station.

The conclusion is that the Director-General did not act *ultra vires* or abuse his discretion in taking "headquarters" to mean Geneva. It is immaterial that in so doing he robbed the rule of any purpose: all the Commission's staff are at headquarters and the rule serves no purpose for United Nations staff in New York either.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 18 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

MICHEL GENTOT JULIO BARBERIS JEAN-FRANÇOIS EGLI

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

EIGHTY-SIXTH SESSION

In re **Cinquantini**

Judgment 1820

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Bruno Cinquantini against the European Patent Organisation (EPO) on 4 February 1998 and corrected on 4 April, the EPO's reply of 22 June, the complainant's rejoinder of 20 July and the Organisation's surrejoinder of 31 August 1998;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Italian who was born in 1953, joined the European Patent Office, the EPO's secretariat, in 1980 at The Hague. He was transferred to Munich in 1984 and to Vienna in 1992. He went back to Munich on 19 February 1996 as a principal administrator at grade A4.

Article 73 of the Service Regulations entitles an employee to payment of one month's basic salary in installation allowance on transfer from one duty station to another at least 400 kilometres away. An additional month's basic salary is payable by way of installation allowance to someone in receipt of a household allowance who has at least two dependent children provided, among other things, that "the spouse and dependent children have taken up residence at the place of employment".

On 4 March 1996 the complainant claimed the additional installation allowance on the grounds that his wife and three dependent children had taken up residence in Munich at 1 March 1996. On 7 March the Remuneration Department refused his claim on the grounds that his family had stayed on at the same address in Munich while he had been serving in Vienna. He appealed on 14 March 1996. By a letter of 11 November 1997, the impugned decision, the Director of Personnel Development told him that the President of the Office had, on the Appeals Committee's unanimous recommendation, rejected his appeal.

B. The complainant has two pleas.

The first is that the EPO is misreading Article 73 of the Service Regulations: the only condition that the employee's family need meet is that they take up residence at the new place of employment before the date of the claim. Any other condition or restriction would be wrongful.

The complainant's other plea is that what the EPO did was arbitrary and discriminatory. It acted arbitrarily in taking an unofficial and wrong list of children attending the European school to determine that his family were still resident in Munich, whereas they did not live there in 1992 and 1993. It discriminated against him in that the rules require no such enquiry and it did not make one in other cases. He claims payment of the additional allowance.

C. In its reply the EPO acknowledges that the English, French and German versions of Article 73 do not say quite the same thing, but argues for construing it in a way that is in keeping with the case law. The ordinary installation allowance and the additional one for the employee's family are plainly meant to defray the costs of a change of residence. The complainant's family stayed on in Munich while he was in Vienna. There was nothing arbitrary about what the EPO did because it had the duty of checking that he qualified for the additional allowance. It abided, too, by common practice, and he adduces no evidence to suggest that it discriminated against him. The case he makes out is simply not "serious".

D. With his rejoinder the complainant offers evidence to show that one of his sons was at school in Italy in 1992-93. His wife too, being unable to get a residence permit for Germany while he was in Vienna, was officially resident in Italy. So his family were not continuously resident in Munich.

He claims an award of one German mark in token damages for the defendant's saying that his arguments are not serious. He points out that because he had to pay for the upkeep of his family at more than one place from 1992 until 1996 he ran up expenses that he never claimed.

E. In its surrejoinder the Organisation objects to the complainant's taking only the French version of Article 73. The article requires a change of residence both by the staff member and by his family. Only one of the complainant's three children was at school elsewhere than at Munich, and for only one school year at that. Where his wife was "officially resident" is neither here nor there: the place of residence is an issue of fact. Lastly, the defendant denies imputing to him any dishonourable intent.

CONSIDERATIONS

1. The complainant joined the EPO at The Hague in 1980 as an examiner of patents at grade A1. The Organisation transferred him to Munich on 1 September 1984 and to Vienna on 17 January 1992. It sent him back to Munich on 19 February 1996 as principal administrator at grade A4. He is married and has three sons, born in 1979, 1983 and 1984.

While serving in the office in Vienna he lived either in the city or in the outskirts, but he kept on his flat in Munich and with one exception his sons went to the European School there. His wife and second son were living in Blera, in Italy, and the boy attended school there in 1992-93. By 1993 his wife and three sons were together again in Munich, and they lived in his flat there until he himself went back in 1996.

On his return to Munich he was paid the basic installation allowance but he claimed payment of an additional allowance under Article 73(1) and (2) of the Service Regulations on the grounds that his wife and sons had taken up residence there.

On 7 March 1996 the Organisation rejected his claim: the additional allowance was payable only if the staff member's transfer to a new duty station had required the family to change residence whereas his own family had been living in Munich before he had moved back there.

The complainant lodged an internal appeal. The Appeals Board recommended rejecting it on the grounds that, though the French version of Article 73(2) made grant of the additional allowance depend on the mere fact of the family's residence at the new duty station, the English and German required their taking up such residence because of the transfer; those versions were preferable; and so the complainant did not qualify. The President of the Office endorsed that recommendation on 11 November 1997, and that is the decision under challenge.

The complainant asks the Tribunal to quash the decision and claims payment of the additional allowance. In his submission it is the French that best conveys the draftsman's intent and it would be in keeping therewith for him to get the allowance: after all, he had no lesser costs to meet than if he had had to remove his family from Vienna to Munich.

The EPO asks the Tribunal to dismiss the complaint for the reasons it gave in answering the internal appeal.

2. The material rules are in Article 73:

> "(1) An installation allowance shall be payable to permanent employees:
>
> a) ...
>
> b) on transfer from one place of employment to another place of employment, these places of employment being situated at least 400 kilometres apart, provided such transfer is of indefinite duration exceeding two months.
>
> This installation allowance shall be equal to one month's basic salary; it shall be supplemented by an additional payment of ... one month's basic salary for permanent employees entitled to a household allowance and having at least two dependent children.
>
> (2) ... the additional payments referred to in paragraph 1 shall be payable only where the spouse and dependent children have taken up residence at the place of employment ..."

and in the other language versions:

> "... les compléments d'indemnités visés au paragraphe 1 ne sont dus que si le conjoint et les enfants à charge résident au lieu d'emploi ..."

> "... die Zuschläge zur Beihilfe nach Absatz 1 werden nur dann gezahlt, wenn der Ehegatte und die unterhaltsberechtigten Kinder am Ort der dienstlichen Verwendung Wohnung genommen haben ..."

The conditions for payment of the additional installation allowance do not appear to be the same in French as in English and German in that the French requires the mere fact of residence of the family at the duty station but the English and German their taking up residence there.

Where a rule is cast in more than one official language and no one version is to prevail, all versions shall be deemed to bear the same meaning and the right construction shall be the one that respects the draftsman's intent and best reconciles them: see, in general, Judgments 853 (*in re* Benze No. 6) under 5, and 1032 (*in re* Senftl) under 2; and, for the interpretation of administrative decisions, 537 (*in re* Lhoest No. 2) under 5 and 1450 (*in re* Kock and others) under 15 and 16.

Here there is no real discrepancy. The French text requires the fact of residence but does not say at what date it should have been taken up; the English and German say neither that residence should have been taken up at any particular date nor that residence at the new duty station must continue. The versions are open to an interpretation that reconciles all three.

The interpretation must fit the legal context. The allowance is an additional one payable to the employee in the event of transfer. Unless the contrary can be shown, it stands to reason that, being additional and therefore incidental, it should be due on the same terms as the basic allowance, namely where the employee or family changes residence.

The purpose of it, too, is obviously the same, namely to help the employee meet the costs of removal, which are ordinarily higher when the family is moving as well.

The conclusion is that the additional allowance is payable when, on the employee's transfer, the family takes up residence at the new place of employment and is still living there at the time of the claim.

That condition is not met here since the complainant's wife and children were already resident in Munich before his transfer.

3. His pleas in favour of a more liberal construction of the rule are unconvincing. Arguing for a literal construction, he says that the EPO should not be importing conditions that the text does not set.

Such a construction would not have odd results. A change in place of residence is a condition that would hold good only for the employee, and payment of the additional allowance would turn, not on any change of residence, but on the mere fact of residence at the new duty station, the costs of installation being higher when the whole family moves. But the EPO is right to put on the material text any construction that is lawful. Besides, the requirement of a change in the place of the family's residence does appear in the English and German versions. Lastly, when, on the employee's transfer, the family does not actually move, the employee will incur no further costs warranting the grant of the additional allowance.

Would that allowance be due when the official's family changes homes at the duty station, just as it would be if the family moved to the duty station from somewhere else, however near? The EPO suggests that it would be, but since that is not the case here, there is no need to rule on the issue.

In support of his own interpretation the complainant cites the form to be filled up to claim the additional allowance under Article 73. He points out that the form says nothing of the further conditions the EPO is setting for payment. But the plea fails. The form asks when wife and children took up residence at the new place of employment. Actually he put "01.3.96": the date is wrong, or at least an idle slip.

He pleads equity: in his submission keeping his family on in Munich while he was in Vienna cost him dear; so it would be only fair to let him have at least the additional allowance to offset those costs. But he thereby overlooks the fact that the EPO helps in meeting only the costs of removal: the basic allowance for the employee and the additional one for the family.

The complainant observes that shortly after going back to Munich and making his claim to the additional allowance he took a bigger flat and moved into it and so ran up costs that it would be only fair to refund. Such removal at one and the same place has nothing to do with a change of duty station. An employee who has never changed duty stations at all may move house; and the conditions in Article 73 for payment are not met.

Lastly, the complainant pleads personal prejudice. He says that the EPO paid the additional allowance to others who had changed duty stations without asking whether their family had moved. But he cites no particular instance, and the EPO answers that it has always put the same construction on Article 73. Since improper payment of the additional allowance is not proved, the plea of prejudice and the implied one of discrimination cannot succeed.

4. The EPO has said that the complainant's case is not "serious". The term is not an abuse of the freedom of speech allowed to litigants and casts no aspersion on him. It warrants no penalty.

5. The complaint is utterly devoid of merit.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 13 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

A.B. GARDNER

EIGHTY-SIXTH SESSION

***In re* Allaert and Warmels (No. 3)** **Judgment 1821**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr. Eric Jaak Allaert and Mr. Rein Herm Warmel - his third - against the European Southern Observatory (ESO) on 8 August 1997 and corrected on 17 November 1997, the ESO's reply of 4 February 1998, the complainants' rejoinder of 11 May and the Observatory's surrejoinder of 31 July 1998;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Judgment 1419 (*in re* Meylan and others) of 1 February 1995 describes trends in ESO policy on staff pay. By a decision which the Council of the Observatory took in December 1982 the periodic adjustment of salary and allowances paid to the international staff followed procedures applied by the Coordinated Organizations.[*] In July 1991 the practice was embodied in Article R IV 1.01 of the Staff Regulations. In 1992 the ESO decided to refuse its staff the full adjustment granted by the Coordinated Organizations.

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[*] They include the North Atlantic Treaty Organization (NATO), the Organization for Economic Cooperation and Development (OECD), the Council of Europe (CE), the European Space Agency (ESA), the Western European Union (WEU) and the European Centre for Medium-Range Weather Forecasts (ECMWF).

The matter came to the Tribunal and in Judgment 1419 the Tribunal declared the decision to be arbitrary.

In March 1995 the ESO embarked on the review of the wording of R IV 1.01 to take account of what the Tribunal had said in Judgment 1419. The upshot was that at its session on 28 and 29 November 1995 the Council adopted a new provision: the Council was to use "as an orientation" an index corresponding to "the adjustment rate" calculated according to the procedure of the Coordinated Organizations; in assessing whether the index was to be applied the Council would take into account such criteria as the economic, budgetary and social situation in the Organization and in member States. The new text came into force on 1 January 1996.

At a meeting of the Finance Committee on 6 and 7 May 1996, the Director General proposed a 0.7 per cent adjustment in pay at 1 January 1996. The paper that it put to the Committee said that the rate of adjustment recommended by the Coordinating Committee on Remuneration in the Coordinated Organizations was 1.3 per cent in Germany and that that figure was lower than the national index for Germany, which was 2.4 per cent. The Committee recommended that the Council approve a 0.7 per cent adjustment and on 10 and 11 June the Council agreed.

On 15 July 1996 the complainants got their pay slips for that month. On 12 September they appealed to the Director General against the pay slips, treating them as the individual decisions applying the Council's general decision to grant them only a 0.7 per cent adjustment in pay. The matter went to the Joint Advisory Appeals Board, which reported on 30 April 1997. In its report it said that it was in favour of allowing the appeals on the following grounds: it held that, though competent to set pay policy, the Council was not free to ignore such policy or to act arbitrarily; moreover, pay policy at the ESO was still the same as in the Coordinated Organizations; and there was no justification for a 0.7 per cent adjustment. By letters of 13 May 1997, which are the impugned decisions, the head of Administration told the complainants that the Director General was upholding his decision.

B. The complainants have four pleas.

The impugned decisions break the rule against retroactivity. The adjustment granted on 1 January 1996 affects the salary paid to staff for the period from 1 January to 31 December 1995.

The process whereby the impugned decisions were adopted is unlawful. It leaves the way open to uncertainty in law, since it rejects the whole principle of adjustment, and so is arbitrary too. It makes Article R IV 1.01 meaningless. It offends against the principles applicable to any system of pay as the Tribunal defined them in Judgment 1419 and against the Noblemaire principle.

Even supposing that the text of R IV 1.01 as in force at 1 January 1996 empowers the Council to stop adjusting staff pay, the impugned decisions are in breach of two essential conditions of service of the complainants, to wit their acquired right to the adjustment of pay and their general right to conserve their pay.

Lastly, the impugned decisions were in double breach of the independence of international civil servants. First, the Administration bowed to the wishes of a member State, Germany, without questioning the aims that State was pursuing. Secondly, the real grounds for the decision it took are tantamount to breach of the principle of independence by that member State and on that score ESO was guilty of abuse of authority.

The complainants ask the Tribunal to order the quashing of the decisions of 13 May 1997 insofar as they granted only a 0.7 per cent adjustment in pay as from 1 January 1996 and to award them costs.

C. In its reply the ESO says that it finds the complainants' attitude regrettable and their criticisms of a member State especially inadmissible.

On the merits it rebuts their plea that the impugned decisions broke the rule against retroactivity. The proposal for adjusting pay was to come into force on 1 January 1996 and the Council's decision of 10 and 11 June 1996 was applicable from the same date.

The defendant says that the process whereby the impugned decisions were taken was not unlawful. Judgment 1419 makes it plain that the policy decision taken in 1982 was to lapse so that the Observatory's intent could be fulfilled, and that intent consists nowadays in ensuring its very survival. On 28 and 29 November 1995 the Council therefore revoked that decision for the explicit purpose of restoring the Observatory's sovereign and autonomous authority to decide on its own pay policy. That decision was taken in compliance with the proper procedure.

The Council is by no means asserting the right to take arbitrary decisions on the adjustment of staff pay. But since the policy decision of 1982 was set aside it has wider discretion in the matter.

The system adopted in 1995 does not offend against any general canon of law. It is doubtful whether the Noblemaire principle applies to the ESO, and there is no reason in any event to suppose that it was infringed here. The complainants' plea of breach of acquired rights rests on the mistaken belief that the Council wanted to do away with the salary adjustment process. All it did was to discard for the future the automatic application of a particular method of adjustment. Actually in this instance the complainants' pay went up.

The ESO's independence may be compromised only if a member State tries to influence the Administration in disregard of ESO's Staff Regulations and Rules. Here there was no such attempt.

D. The complainants point out in their rejoinder that the ESO sent them letters about the remarks in their complaints which the Administration regarded as critical of the Observatory and its member States. They see that as undue pressure while the case is pending.

They press their pleas on the merits.

They maintain that the new system of adjustment is unlawful and that the ESO may not justify its decision on merely financial grounds. As for the breach of their acquired rights, Judgment 1419 expressly laid down obligations for the Observatory and those obligations are no longer embodied in the rules.

E. In its surrejoinder the defendant explains that its member States are especially concerned about the discrepancy between the pay of its own staff and that of staff at counterpart national institutes for research, and the whole point of the decision under challenge is to remove those discrepancies. The new system of adjustment of pay is lawful and is in no way arbitrary.

CONSIDERATIONS

1. At issue in these complaints is the salary adjustment granted by the European Southern Observatory to its employees for 1996.

2. The complaints attack decisions of the Director General refusing to endorse a favourable recommendation which the complainants had obtained from the Joint Advisory Appeals Board. The Board had held that the decision of the ESO Council to grant a salary increase of only 0.7 per cent for 1996 – rather than the 1.3 per cent recommended by the Coordinated Organizations – was invalid because the ESO's salary policy did not provide for a methodology that would lead to stable, foreseeable and clearly understood results.

3. Notwithstanding the very clear basis upon which the Board found in their favour, the complainants have chosen to present again, and at length, all the arguments which they had urged unsuccessfully before the Board. As will appear in due course, those arguments are entirely without merit. The complainants have really only one valid point to make and it is decisive.

4. Article R IV 1.01 of the ESO's Staff Regulations reads as follows:

> "When reviewing remuneration and allowances, the Council shall use as an orientation an index which shall correspond to the adjustment rate calculated according to the salary adjustment procedure of the Coordinated Organizations with respect to adjustments of the basic salary scales of the Coordinated Organizations in Germany.
>
> When assessing whether or to which extent this index shall be applied as the actual salary increase, Council shall take into account relevant criteria including the economic, budgetary and social situation prevailing both in the Organization and in the member states.
>
> The basic salary scales and the allowances for international staff in Germany and Chile shall be approved by the Council.
>
> *)The remuneration and allowances for members of the personnel at duty stations outside Germany shall be adjusted by applying a cost of living differential in order to obtain equal purchasing power using Munich as lead town.
>
> *)Applicable as of June 8, 1995"

5. At a meeting of the Observatory's Finance Committee on 6 and 7 May 1996 the Director General presented a report recommending a salary adjustment of 0.7 per cent. This figure was well below not only the one of 1.3 per cent established by the Coordinated Organizations but also the rise of 2.4 per cent in the German consumer price index. The only explanation given for the discrepancy appears to be a desire to follow "the practice of salary increases based on merit and of salary adjustments for individual staff members". There is no detailed analysis of the reasons why the figure of 0.7 per cent was chosen rather than any other. Nonetheless the Finance Committee approved the report. Salary increases based on merit or other individual considerations are of course the antithesis of salary adjustments to the scale, which are designed to keep *all* salaries from losing purchasing power.

6. At its meeting of 10 and 11 June 1996 the Council adopted the Finance Committee's recommendation. The minutes do not reflect what, if any, "relevant criteria" were taken into account.

7. The principles governing the limits on the discretion of international organisations to set adjustments in staff pay have been well established in a number of judgments. Those principles may be concisely stated as follows:

(a) An international organisation is free to choose a methodology, system or standard of reference for determining salary adjustments for its staff provided that it meets all other principles of international civil service law: Judgment 1682 (*in re* Argos and others) in 6.

(b) The chosen methodology must ensure that the results are "stable, foreseeable and clearly understood": Judgments 1265 (*in re* Berlioz and others) in 27 and 1419 (*in re* Meylan and others) in 30.

(c) Where the methodology refers to an external standard but grants discretion to the governing body to depart from that standard, the organisation has a duty to state proper reasons for such departure: Judgment 1682, again in 6.

(d) While the necessity of saving money may be one valid factor to be considered in adjusting salaries provided the method adopted is objective, stable and foreseeable (Judgment 1329 (*in re* Ball and Borghini) in 21), the mere desire to save money at the staff's expense is not by itself a valid reason for departing from an established standard of reference: Judgments 1682 in 7 and 990 (*in re* Cuvillier No. 3) in 6.

8. Merely stating the above principles is enough to lead the Tribunal to conclude without hesitation that the complaints must be allowed. Even if it were possible to dignify the process adopted by the ESO by calling it a methodology for salary adjustment, it obviously fails to produce results that are stable, foreseeable and clearly understood. The rule laid down by the Tribunal is simply an extension of the general principle that an organisation may not act arbitrarily and must adopt an objective methodology for salary adjustment. In the case at bar the ESO has failed to demonstrate that the decision was not simply arbitrary.

9. At the hearings of the Appeals Board the Observatory was asked repeatedly to explain exactly what factors were involved in the decision but was unable to provide any adequate explanation. The nearest thing to an objective standard was the suggestion that ESO salaries "should be at a level which is compatible with the German high-tech industries". There is, however, not one iota of evidence before the Tribunal to demonstrate that salaries in "German high-tech industries" were actually compared. Nor at any time did the ESO offer any explanation of the factors or statistics that it considered in lowering the salary adjustment from 1.3 to 0.7 per cent. There is simply no evidence at all on the matter: the discussion during the Council meeting was not recorded and the Observatory, though given ample opportunity to do so, did not present any evidence to the Appeals Board and has not attempted to rectify that omission before the Tribunal.

10. The ESO has failed not only to establish any methodology, let alone one which complies with the above-stated requirements of international civil service law, but also to show compliance with Article R IV 1.01 of its own Staff Regulations, quoted in 4 above. That article requires the use of the Coordinated Organizations' index as an

"orientation". It is simply impossible to see any orientation towards that index in the impugned decisions. Likewise, though the article requires the Council to take account of "relevant criteria", there is no evidence that it did so.

11. In these circumstances, and because of the ESO's total failure to establish any basis upon which it could do anything but follow the Coordinated Organizations' index, the Tribunal can only set aside the impugned decisions and return the matter to the ESO for recalculation of the salary adjustment for 1996.

12. As stated in 3 above, the complainants have raised other arguments which were deservedly unsuccessful before the Appeals Board. For the sake of completeness they may be summarily mentioned here.

13. The complainants argue that the impugned decisions are retroactive. This argument apparently rests on the requirement in Article R IV 1.01 of the Staff Regulations that the adjustment for 1996 be based on the accumulated statistics of the Coordinated Organizations for 1995. To adjust salaries in one year so as to reflect conditions in the preceding year is a wholly prospective operation. The adjustment has no effect on any past salary or payment due. The adjustment made in 1996 is not a payment in respect of the 1995 salary. Employees who left before the end of 1995 have no entitlement to it, while those who joined after 1 January 1996 receive the full benefit of it. There is nothing retroactive about it.

14. For much the same reason the complainants' argument that the impugned decisions adversely affected their acquired rights is wholly unfounded. The salary adjustment was applied prospectively to their salaries for 1996. They have acquired rights neither to a particular level of adjustment nor to a particular methodology. They have, of course, a legal right to a methodology for salary adjustment which meets the criteria outlined and discussed above, but that is not the same thing as an acquired right.

15. The complainants' final argument is a long and diffuse attempt to demonstrate that member States exercised an undue influence upon the

ESO's decisions regarding salary adjustment. It is misconceived to the extent that it suggests that member States attempted to influence management in some unlawful way outside the system of democratic participation in the various committees and governing body. There is simply no evidence of any kind to support such an argument. All comments and statements by member States were made within the context of the proper decision-making organs of the ESO's structure. To the extent that the complainants are attempting to show that member States tried to influence the decision through the committees or the governing body to which they belonged, it was perfectly proper for them to do so. An international organisation would not exist without its member States and the proper means for them to exert influence over an organisation they create is precisely that of debate, discussion and persuasion within the committees and governing body of the organisation itself. This argument suggests some misunderstanding of precepts of international law.

16. The Tribunal awards the complainants 10,000 French francs in costs.

DECISION

For the above reasons,

1. The Tribunal sets aside the impugned decisions.

2. It orders the ESO to recalculate the adjustment of salary for staff as from 1 January 1996 in accordance with Article R IV 1.01 of the Staff Regulations and in the light of this judgment.

3. It awards the complainants 10,000 French francs in costs.

In witness of this judgment, adopted on 6 November 1998, Mr. Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

A.B. GARDNER

EIGHTY-SIXTH SESSION

***In re* Visanji (No. 2)**
(Application for review)

Judgment 1822

THE ADMINISTRATIVE TRIBUNAL,

Considering the application filed by Miss Marcia Visanji on 29 November 1997 for the review of Judgment 1656;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 7 of its Rules;

Having examined the written submissions and disallowed the complainant's application for hearings;

CONSIDERATIONS

1. This is an application for the review of Judgment 1656. The facts f Miss Visanji's original complaint are set out in that judgment. In reply he European Molecular Biology Laboratory (EMBL) pleaded irreceivability n the grounds that she had failed to exhaust her internal remedies. The ecision she was impugning was what she saw as the implied rejection of laims which she said she had put to the Laboratory in a letter of 26 August 996. The Tribunal observed in 8 that she had not supplied a copy of those laims with her complaint and, even though the Laboratory's reply to the omplaint said that it had never received them, she had not supplied the text ith her rejoinder either. The conclusion was that she had failed to establish at she had made the claims and her complaint was therefore irreceivable.

2. Her first argument in support of her application is that her complaint failed because she had missed the internal time limit for filing her claims, but that she had not.

3. The Tribunal made no such ruling. The third sentence of 8 began with the words "Even assuming that those claims were not by then time-barred". So the reason for the dismissal of her complaint was not that she had missed any time limit.

4. The reason was her failure to prove that the Laboratory had received the claims in her letter of 26 August 1996. It is in that context that she makes her second plea, and she cites a letter that the Administrative Director of the Laboratory wrote her on 7 January 1997 acknowledging receipt of "copies of your letters of 13 May and 26 August 1996". That shows, she submits, that she did notify her claims in the letter of 26 August.

5. Her plea fails. The letter of 7 January 1997 went on:

> "We had already received your formal complaint to the Administrative Tribunal ... and our response to [the Tribunal] had already been sent today, some hours before receiving the copy letters from you. The matter now falls to be dealt with by [the Tribunal] and you should receive a copy of our response to them shortly."

The Director's letter of 7 January 1997 does not prove that the Laboratory had got her letter of 26 August 1996 in the days that followed. She made her complaint on the assumption that it had and that, when she got no reply, there was implied rejection of the claims in it. Her sending a copy of her letter after filing her complaint, and even after the filing of the Laboratory's reply, did not remedy the lack of evidence to bear out her contention that the Laboratory had got her letter at the time. Yet such is the only evidence she offers in this application to support her argument. Indeed there is still no evidence to show receipt of her letter at the time. The Director's letter of 7 January 1997 is not a "new fact".

6. In her present application she asks that the following corrections of fact be made:

> "I was dismissed without pay and later dismissed with pay. The judgement refers only to health matters whereas there were a number of points that the correspondence between the defendant, EMBL and myself highlights,

harassment, destruction of private property and personal belongings left with the defendants, bribing, refusal to supply information vital and necessary for the medical board and internal review."

7. None of those issues, however, is relevant to review of Judgment 1656, which dismissed the complaint as irreceivable and did not go into the merits. Since the Tribunal made no findings of fact on the merits, her allegations of fact on that score are not material. Nor has she shown any mistaken finding of fact that affects the issue of receivability.

8. Since her application is clearly devoid of merit, it must be summarily dismissed under Article 7 of the Tribunal's Rules.

DECISION

For the above reasons,

The application is dismissed.

In witness of this judgment, adopted on 6 November 1998, Mr. Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

A.B. Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-SIXTH SESSION

***In re* Mentore-McKie** **Judgment 1823**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Faye Mentore-McKie against the Food and Agricultural Organization of the United Nations (FAO) on 23 December 1997 and corrected on 18 February 1998, the FAO's reply of 13 May, the complainant's rejoinder of 13 July and the Organization's surrejoinder of 9 October 1998;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for the hearing of witnesses;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant is a citizen of Guyana who was born on 15 September 1959. She joined the Office of the FAO's Representative at Port-of-Spain, in Trinidad, on the 19 October 1989. She was employed as a cleaner at grade G.1. Her original appointment was for a fixed-term of one year, but it was renewed several times, up to 30 March 1996.

By a letter of 30 May 1995 the Director of the Office for Coordination of Normative, Operational and Decentralized Activities (OCD) at headquarters, in Rome, told all the FAO's Representatives that in the context of reform the Administration had decided to amend the structure of the staff in the General Service category in country offices. For the Office at Port-of-Spain the intention was to have the complainant's job done by a cleaning company.

At a meeting on 22 June the acting Representative in Trinidad and Tobago told the General Service category staff of the plans for reform. By a letter of 27 June to the acting Representative the complainant said she hoped to go on working in the Organization, but in a less junior post, and she pointed out that she had been taking training courses and was willing to take more. On 10 July the acting Representative informed her that she was not well enough qualified for the FAO to keep her on. In a letter of 31 July to the recruitment section of the Personnel Division at headquarters she applied for any post for which she had the right qualifications and experience. By a letter of 22 August a personnel officer suggested that she should apply for any posts in the General Service category that might fall vacant.

By a letter of 30 November a personnel officer told her that her appointment would end at 31 December 1995 because of the reforms of the Representative's Office. He explained that the letter gave her the notice of separation that the FAO's Manual required. On 22 December 1995, however, the Director of OCD told the acting Representative by fax that her appointment had been extended to the end of February 1996.

On 19 January 1996 the complainant appealed to the Director-General against the termination of her appointment and asked for an appointment to a post as a programme clerk or any other vacant or reclassified post.

In a letter of 30 January 1996 to the Director of OCD she asked for redeployment within the reformed Office. By a fax of 5 February to the Director she asked for transfer to a post as programme assistant at grade G.6, still at Port-of-Spain. The Director of the Personnel Division answered on 6 February that she could be transferred only to a post at the same grade.

On 15 February the Director of Personnel acknowledged receipt of her appeal of 19 January. In a letter of 28 February a personnel officer of OCD told her of decisions to extend her appointment for the last time to 30 March 1996 and to abolish her post at 29 March. The personnel officer also said that she would be paid a dismissal indemnity under Staff Regulation 301.15. By a memorandum also dated 28 February the Office informed the General Service staff of three vacant posts: one for a programme clerk and secretary at grade G.4, one for an administrative clerk, also at G.4, and one for a G.5 secretary. On 12 March the complainant applied for the post of administrative clerk.

On 1 July the Assistant Director-General in charge of Administration and Finance told her that her appeal of 19 January was rejected as devoid of merit, and she went to the Appeals Committee on 29 August.

On 28 November 1996 she applied for a post as programme assistant at grade G.6 in the Port-of-Spain Office. The local Selection Committee decided against having an interview with her on the grounds that she did not have the experience that the post required.

By a letter of 7 February 1997 the FAO's Representative told her that the headquarters Selection Committee had rejected her for the post of administrative clerk. She appealed against that decision to the Director-General on 16 April. In a letter of 10 June the Assistant Director-General in charge of Administration and Finance pointed out that by the time her letter of 7 February had reached him she was no longer a member of the staff; so her appeal was irreceivable under Staff Regulation 301.111.

By a letter of 7 May the complainant appealed to the Director-General against the decision not to interview her for the post of programme assistant. On 7 August the Assistant Director-General rejected that appeal on the grounds that it was irreceivable under Staff Regulation 301.111.

In the meantime, on 27 June 1997, the Appeals Committee had recommended rejecting her appeal of 29 August 1996 although it felt that, because she had tried to improve her lot and the quality of her services to the Organization, a "special effort" should be made to find her some other job. By a letter of 10 September 1997, which is the impugned decision, the Director-General told her that her appeal was rejected.

B. The complainant submits that the Organization acted unlawfully by showing prejudice and discriminating against her.

She says that the FAO's Office in Trinidad and Tobago overlooked her qualifications by telling headquarters that she was not fit for any post in the new administrative structure. She says that the interview she had on 22 May 1996 for the post of administrative clerk at grade G.4 was improper and that the Office ought to have considered her for the post of programme assistant at grade G.6 since she was more fully qualified for that post than for the G.4 one.

She contends that the decision not to renew her appointment after 31 December 1995 was unlawful because the FAO had not abolished her old post but had merely farmed out her work and ended her appointment. She says that she got no notice of dismissal.

In her submission the hearings before the Appeals Committee were flawed in several respects, in particular the inadequacy of the evidence.

She claims the quashing of the decisions which led to her termination and the award of damages for the injury that the Organization caused her while she was in its employment and after she had gone.

C. In its reply the FAO says that it complied with the material rules. Staff Regulation 301.091 says that the Director-General may terminate her fixed-term appointment if the Organization's requirements entail the abolition of the post or a reduction in staff. Manual paragraph 374.61 further provides that the appointment of a locally recruited member of the staff may be terminated on the grounds of abolition of post when no other suitable assignment is possible at the duty station. The Organization says that it deliberately terminated the complainant's appointment on 29 March, although it was to expire the next day, so that she would get termination indemnities. Besides, she had known since the staff meeting of 22 June 1995 that her post was to go.

The defendant submits that any claim made by the complainant and arising out of the rejection of her applications for the posts of administrative clerk and programme assistant is irreceivable because by the time she had notice of those decisions and challenged them she had left the staff.

In subsidiary argument the defendant challenges the complainant's pleas on the merits.

It rejects her contention that she was dismissed because of prejudice or was discriminated against.

D. In her rejoinder the complainant submits that it was the Organization's letter of 28 February 1996 that told her for the first time that her post was to be abolished. On 30 November 1995, when it gave her notice of termination, the decision to abolish her post had not yet been taken. As to receivability she points out that, even if her appeals against the rejection of her applications were irreceivable on the grounds that she was no longer a staff member when she lodged them, all the information relevant to those applications is receivable because it has a bearing on her appeal of 19 January, when she was still on the staff. She enlarges on her pleas and presses her claims.

E. In its surrejoinder the defendant points out that it told her on 22 June 1995 that her post was to go. Though the decision did not take effect until some ten months later, the subcontracting of cleaning work required earlier contacts with a suitable firm. The Organization presses its pleas.

CONSIDERATIONS

1. In October 1989 the complainant joined the Office of the FAO's Representative – known as "the Representation" – at Port-of-Spain, in Trinidad. The Organization employed her as a cleaner at grade G.1 under a fixed-term appointment for one year which it renewed several times.

2. In May 1995 headquarters in Rome decided to revise the "staffing pattern" in the General Service category as part of an overhaul of the Organization's structure. One post picked out for abolition was the complainant's. At a meeting on 22 June the FAO's acting Representative at Port-of-Spain told the General Service staff there of the plans for reform. On 28 June he wrote to headquarters proposing, among other things, that "the post of Cleaner be replaced by contracted cleaning services".

3. By a fax message of 5 December 1995 the Director of the Office for Coordination of Normative, Operational and Decentralized Activities (OCD), in Rome, informed the acting Representative of the new "staffing structure" at Port-of-Spain. It showed that the Organization was to terminate the complainant's appointment.

4. By a letter of 31 July 1995 to the Personnel Division at headquarters the complainant had applied for "a post commensurate with [her] academic qualifications and experience". She said that she had an "undergraduate diploma" in natural science and a Bachelor of Arts degree in English from the Caribbean Union College, besides experience of teaching and some training in home economics. By a letter of 22 August 1995 a personnel officer at headquarters answered that she was not qualified for a position in the Professional category of staff because she did not have "at least three years of postgraduate work experience in a field of interest to the Organization", but she might wish to apply "when higher-graded General Service posts in the FAO Representation become open to recruitment".

5. By a letter of 30 November 1995 another personnel officer at headquarters warned her that it might prove "necessary to end [her] appointment on or before its not to exceed date of 31 December 1995". Yet in December 1995 the Director of OCD did grant her an extension of appointment, to 29 February 1996.

6. By a letter of 19 January 1996 she appealed to the Director-General against the termination of her appointment. She contended that she was a "victim of continuous discrimination" in that despite her years of service and her qualifications she had not been considered for suitable vacant posts. She wanted to be recommended for a post of programme clerk or any others she was deemed fit for.

7. In a fax letter of 5 February 1996 to the Director of the Personnel Division she asked for transfer to a vacant post for a G.6 programme

assistant at Port-of-Spain, but in a fax reply of 6 February the Director said that "lateral transfer" must be at the same grade; but she was free, like anyone else, to apply for the vacancy.

8. By a letter of 28 February 1996 yet another personnel officer told her that, though the Organization was extending her contract to 30 March 1996, it would end her appointment on the 29th on the grounds of the abolition of her post.

9. By a letter of 1 July 1996 the Assistant Director-General in charge of Administration and Finance informed her that the Director-General had rejected as devoid of merit her appeal of 19 January 1996; he could not recommend picking her for any of the posts she wanted: "selection procedures", he explained, "were put in place for that purpose and the Organization is intent on observing them". On 29 August 1996 she lodged an appeal with the Appeals Committee against the decision of 1 July.

10. In its report of 27 June 1997 the Committee expressed sympathy but found no evidence to support her pleas of discrimination and personal prejudice. She did not – it held – have the experience required for "the available vacancies in the Representation", and it recommended rejecting her claims as devoid of merit. But it felt that because of her "commendable efforts to improve her situation and her service … during the past 7 years, a special effort should be made to try to find a position for her". By a letter of 10 September 1997 the Director-General dismissed her appeal as being without merit, and that is the decision she is impugning.

11. On 12 March 1996 she had applied for a G.4 post as administrative clerk and she was interviewed for it on 22 May 1996. By a letter of 7 February 1997 the FAO's Representative at Port-of-Spain told her that she had been unsuccessful, and against that decision too she appealed to the Director-General on 16 April 1997. On 10 June 1997 the same Assistant Director-General rejected her appeal on the Director-General's behalf as "not receivable and unfounded" and said that if she wished to go to the

Appeals Committee she might do so, in accordance with Staff Rule 303.1313 and Manual section 331, within sixty days. She did not, however, appeal to the Appeals Committee.

12. She had applied for a G.6 post of programme assistant on 28 November 1996 but this time was not interviewed. On 7 May 1997 she appealed to the Director-General against the refusal of an interview and on 7 August 1997 the Assistant Director-General rejected her appeal as irreceivable, explaining again that she might appeal to the Appeals Committee. Again she did not do so.

13. In this complaint she seeks the quashing of "the decision(s) that led to or resulted in [her] separation" and an award of damages for injury sustained in the course of her seven years' service and since.

The scope of the complaint

14. The complaint properly relates only to issues arising out of the Director-General's decision of 1 July 1996, against which the complainant appealed to the Appeals Committee on 29 August 1996 and which the Director-General confirmed in his decision of 10 September 1997, the one now impugned. She may not challenge before the Tribunal the decision of 10 June 1997 to reject her application for the post of administrative clerk and the one of 7 August not to interview her for the post of programme assistant. According to Article VII(1) of the Tribunal's Statute -

> "A complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations."

Since the complainant failed to lodge appeals with the Appeals Committee against the decisions of 10 June and 7 August 1997 she has not exhausted the internal means of redress. To the extent that she is challenging those decisions her complaint is irreceivable because they are not final ones.

The lawfulness of termination

15. In support of her challenge to the ending of her appointment the complainant pleads that though the Organization purported to give her notice of termination in the personnel officer's letter of 30 November 1995 her post had not yet been abolished and the notice was therefore invalid. The Organization replies that the administrative action taken in the complainant's case strictly observed the material rules.

16. Staff Regulation 301.0912 empowers the Director-General to "terminate the appointment of a staff member with a fixed-term appointment prior to the expiration date for any of the reasons specified in Staff Regulation 301.091 or for such other reasons as may be specified in the letter of appointment". Regulation 301.091 allows such termination, among other reasons, "if the necessities of the service require abolition of the post or reduction of staff". Manual paragraph 374.61 states that the appointment of a locally recruited staff member – such as the complainant was – may be terminated "for abolition of post, no appropriate reassignment being available at the duty station". And Staff Rule 302.9033 reads:

> "A staff member whose fixed-term appointment is to be terminated shall be given not less than 30 days' written notice of such termination or such notice as may otherwise be stipulated in the letter of appointment."

17. Though the complainant also relies on Regulation 301.0911 it does not apply to her case: it confers on the Director-General authority over and above that which he has under Regulation 301.091.

18. The FAO explains that for the complainant's own sake it took care not to let her contract expire at the scheduled date, 30 March 1996: otherwise she would have forfeited her termination indemnity since according to Staff Rule 302.907 and Manual paragraph 374.5 someone whose contract merely expires is not entitled to such indemnity. Instead it terminated her contract on 29 March so that she would be entitled to the indemnity under Regulations 301.091, 301.0912 and 301.15.

19. The Tribunal is satisfied that the Organization complied with the rules. There was nothing unlawful about the notice it gave her in its letter

of 30 November 1995. Although it warned in that letter that her contract might not be extended beyond 31 December it did later extend the contract to 30 March 1996. By a letter of 28 February 1996 it warned that there would be no renewal after 30 March and gave her notice that her contract would end on the day before the date of expiry. The purpose of doing so was to serve her interests by letting her get the indemnity.

20. The Tribunal does not accept the complainant's statement that before 28 February 1996 she herself was not told that her post was to be abolished. As early as 27 June 1995 she had written a letter to the FAO's acting Representative expressing the hope that her appointment "would not terminate with the sub-contracting of the cleaning duties" she was then performing; and again, in a letter of 10 July 1995 to a personnel officer at headquarters, she referred to "recent proposals to have the post of Cleaner ... offered to private contractors".

21. She submits that the FAO's decisions and behaviour "during the reorganisation exercise were prejudicial, discriminatory and unconstitutional" and "constituted violation of the conditions of [her] employment". But the Tribunal finds no evidence to support her allegations.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 13 November 1998, Mr. Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

A.B. Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

EIGHTY-SIXTH SESSION

***In re* Sethi (No. 4)**
(Application for review)

Judgment 1824

THE ADMINISTRATIVE TRIBUNAL,

Considering the application filed by Mr. Devendra Nath Sethi on 8 August 1998 for review of Judgment 1657;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 7 of its Rules;

Having examined the written submissions;

CONSIDERATIONS

1. The complainant is applying for the review of Judgment 1657, which the Tribunal delivered on 10 July 1997 and by which it dismissed his third complaint as irreceivable.

2. He does not allege fraud on the part of the defendant, the World Health Organization (WHO). Nor does he allege the recent discovery of any new fact so material as to make it probable that the outcome would have been different if it had been known at the time of the judgment. In fact all he does is assert that the judgment was wrong and attempt to reargue the issue of receivability.

3. The authority of a final judgment – *res judicata* – cannot be so readily set aside. There are two sides to every case and the party who loses will usually believe that the Tribunal committed an error. There must, however, be an end to litigation and the stability of the judicial process

requires that final judgments of the kind here at issue be set aside only on limited grounds and for the gravest of reasons.

4. The complainant invokes no valid reasons for review of Judgment 1657.

5. His application must be summarily dismissed in accordance with Article 7 of the Tribunal's Rules.

DECISION

For the above reasons,

The application is dismissed.

In witness of this judgment, adopted on 13 November 1998, Mr. Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

A.B. Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-SIXTH SESSION

***In re* Belser (No. 2), Bossung (No. 2) and Lederer (No. 2)**

Judgment 1825

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaints filed by Mr. Paulus Belser, Mr. Otto Bossung and Mr. Kurt Lederer against the European Patent Organisation (EPO) on 23 July 1997 and corrected on 20 November 1997, the EPO's reply of 23 February 1998, the complainants rejoinder of 18 June and the Organisation's surrejoinder of 24 August 1998;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Some facts of relevance to this case are set out in Judgment 1456 (*in re* Belser and others) under A. Since that Judgment was delivered the complainants have been constantly claiming the amendment of the method of reckoning the enhancement of their pension benefits. By a letter of 9 April 1997 they asked the President of the European Patent Office, the secretariat of the EPO, to stop using for that purpose a "retrospective insurance value" (*Nachversicherungswert*) supplied by the German Government. The complainants were alluding to a ruling by the German Federal Administrative Court of 12 December 1996 rejecting Mr. Belser's claim to an order to the Federal Administration to give the EPO the actuarial equivalent of his pension. By a letter of 28 April 1997, which is the impugned decision, the President of the Office rejected the complainants' claim.

B. The complainants charge the German Government with "attempting systematically ... to reduce the salaries and pensions of German civil servants working in international organisations". They maintain that, although Judgment 1456 drew mistaken conclusions from the evidence, the Tribunal ordered a new calculation of the enhancement. They say that the EPO let them have mistaken information and showed bad faith. In their submission that precludes its pleading of the irreceivability of the complaints for failure to respect the time limits. They find it regrettable that no court has yet given a ruling on the merits.

The complainants refer to an agreement concluded on 8 December 1995 between the EPO and the German Government on the transfer of pension rights. The agreement came into force in September 1996 and in their view confirms that it is unlawful to use a retrospective insurance value. Moreover, the ruling of the Federal Administrative Court points out that the Organisation is free to assess the value provided by the German authority.

The complainants ask the Tribunal to set aside the impugned decision, order recalculation of their pension enhancement and declare that the EPO has full discretion in the matter. They further claim the retroactive application of the new enhancement at the date of their retirement, payment of interest on the sums due and an award of costs.

C. In its reply the defendant maintains that the complaints are clearly irreceivable. For one thing, the impugned decision, which merely confirmed earlier ones, has not formed the subject of an internal appeal; for another, the complaints are in breach of the *res judicata* rule.

In subsidiary argument the Organisation pleads that the complaints are devoid of merit. The agreement that the complainants cite applies only to officials whose former pension scheme allows the actual transfer of pension rights. That is not the complainants' case.

D. In their rejoinder the complainants contend that the decision by the Federal Administrative Court was a new fact warranting the claim of 9 April 1997. They point out that the impugned decision was obviously final, especially since the President of the Office had already rejected internal appeals on the same issue. As for *res judicata*, the objections cannot be upheld since the amount of their pension may be recalculated at any time in the event of error or omission.

On the merits they contend that the entry into force of the transfer agreement does warrant recalculation of the enhancement of their pensions.

E. In its surrejoinder the EPO says that it does not press its objections to the receivability and it invites the Tribunal to rule once and for all on the merits. It contends that it is bound by the information certified by the German authorities "as being a fixed value representing retirement pension rights acquired under the previous pension scheme". It presses its arguments relating to the agreement.

CONSIDERATIONS

1. This is the latest skirmish in a seven-year battle between a number of retired German employees of the European Patent Organisation (EPO) and their former employer. At issue is the calculation of their enhancement of their pension benefits.

2. The matter has already been considered twice by the Tribunal in Judgments 1456 (*in re* Belser and others) and 1517 (*in re* Goettgens No. 2) and by the German Federal Administrative Court. All three decisions have been adverse to the positions advocated by the complainants.

3. Yet the complainants again wrote to the President of the European Patent Office requesting him to revise the method of calculating the enhancement of their pension benefits. That request was refused on 28 April 1997, and that is the decision which the complainants impugn before the Tribunal. They submit that the method of calculation based upon the "retrospective insurance value (*Nachversicherungswert*) does not adequately reflect their entitlement under their previous pension scheme as German

civil servants prior to their joining the EPO. The clear implication of the submission is that the Tribunal either misunderstood the facts or improperly applied the law in its previous judgments.

4. The first issue raised by the defendant Organisation is that of irreceivability: the complainants are attempting to appeal against the President's decision directly to the Tribunal without first having resorted to the Appeals Committee; in consequence they have not exhausted their internal means of redress. Since their complaints cannot succeed on the merits and since the Organisation has in any event abandoned the plea in its surrejoinder it is not necessary to rule on receivability.

5. The true issue raised by these complaints is the authority of the Tribunal's judgments, or *res judicata*. There can be no doubt that the classic three identities - of person, cause and object - are here present: the complainants were party to the previous decision; and the cause, or legal foundation for the complaints, and the object, the purpose of the complaints and the remedy sought are identical.

6. The Tribunal's judgments are final and binding. They are not subject to appeal. The Tribunal will not entertain applications for revision or review except in the most unusual circumstances such as fraud or the discovery of conclusive new evidence which could not have been brought forward before. The stability of judicial procedures and the need to bring an end to litigation require that parties must accept the result they obtain even when they are unsatisfied with it. Where both parties have had a full opportunity to present their case and where no new and previously undiscoverable factual element is brought forward the principle of *res judicata* prevents the reopening and rearguing of cases already decided.

7. There is nothing in the circumstances of the present case - including the ruling of the Federal Administrative Court and the transfer agreement of 8 December 1995 - which would allow the Tribunal to revisit its findings in Judgment 1456. There is no allegation of fraud on the EPO's part and no suggestion of new and determinative facts.

8. Lastly, there is nothing to the complainants' argument that in 21 to 26 Judgment 1456 mandated any recalculation of the enhancement. Those passages merely indicate that the Organisation is free to discard any formulations offered by the national administration which offend against the EPO's regulations. That is of no assistance to the complainants.

9. In consequence the application of the *res judicata* rule operates as an absolute bar to the complainants' obtaining any part of the relief sought.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 6 November 1998, Mr. Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

A.B. Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-SIXTH SESSION

***In re* Roedl** **Judgment 1826**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Dorothea Roedl against the European Patent Organisation (EPO) on 23 July 1997 and corrected on 20 November, the EPO's reply of 23 February 1998, the complainant's rejoinder of 18 June and the Organisation's surrejoinder of 24 August 1998;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a German, was seconded from her national civil service to the European Patent Office, the EPO's secretariat, in September 1980. Though subject to the provisions of the Office's Service Regulations, she continued to get promotions within the German civil service until her retirement in June 1994. On 22 March 1995 the EPO gave her notice of the amount due to her by way of pension enhancement. In reckoning that amount the Administration took no account of the promotions her former employer granted her while she was on secondment. By a letter of 25 April 1995 to the Remuneration and Pensions Department she challenged the reckoning of her pension. On 30 April an official in the Department confirmed that her entitlement would be as reckoned. On 12 June 1995 she lodged an internal appeal against the decision of 22 March. On 3 July she got notice of the referral of her appeal to the Appeals Committee and the Administration's decision to defer action on the matter until the Tribunal had ruled on related complaints submitted earlier by Mr. Paulus Belser and others. In Judgment 1456 of 6 July 1995 the Tribunal delivered a ruling on those complaints. The Administration having failed to notify the Committee of its position on her appeal, she lodged the present complaint on 23 July 1997.

B. Her pleas are the same as those put forward by Mr. Belser, Mr. Otto Bossung and Mr. Kurt Lederer in their second complaints: see Judgment 1825 also delivered this day. She observes, however, that her case differed from theirs insofar as her former employer had continued to promote her while she was on secondment. The amount representing the increment in accrued pension rights under her previous employer's scheme should have been deducted from her pension enhancement as reckoned by the EPO. The Administration's reliance on a so-called "retrospective insurance value" (*Nachversicherungswert*) was incompatible with such deduction because the amount of the enhancement was then lower than that of the increase.

She wants the Tribunal to set aside the reckoning made on 22 March 1995 of the enhancement of her pension benefit, order the EPO to recalculate her entitlement and declare the Organisation's "complete independence" in reckoning pension enhancement. She claims back-payment of any sums due on account of the recalculation as from the date of her retirement, plus interest thereon and an award of costs.

C. Relying mainly on Judgment 1456, the EPO submits in its reply that the complaint is irreceivable under the *res judicata* rule. What is more, the increase that the complainant is seeking on the strength of *in absentia* promotions is less than what the Organisation has actually granted her; so she has no cause of action. But the EPO is willing to withdraw its objections to receivability so as to let the Tribunal rule once and for all on the merits. It puts forward the same pleas on the merits as it does in the context of its dispute with Mr. Belser and others.

D. In her rejoinder the complainant contends that the reduction of her 25 to 30 years' seniority in the German civil service to three or four years for the purposes of reckoning her pension enhancement shows how mistaken is the use of a retrospective insurance value. What the EPO ought to have relied on is the actuarial equivalent of her pension entitlement, whatever views the German Government may have expressed.

E. In its surrejoinder the Organisation submits that it is bound by information the German Government passes on as the "fixed value representing retirement pension rights acquired under the previous pension scheme".

CONSIDERATIONS

1. This complaint raises the same questions of substance as those ruled on in Judgments 1456 (*in re* Belser and others) and 1517 (*in re* Goettgens No. 2). The same reasoning as that set out in Judgment 1825, delivered this day on the complaints of Mr. Paulus Belser, Mr. Otto Bossung and Mr. Kurt Lederer, applies to prevent the complainant from obtaining the relief she seeks.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 6 November 1998, Mr. Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

A.B. Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-SIXTH SESSION

***In re* Ochani**

Judgment 1827

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Parmanand Sachanand Ochani against the World Health Organization (WHO) on 24 January 1998 and corrected on 6 March, the WHO's reply of 9 June, the complainant's rejoinder of 20 July and the Organization's surrejoinder of 30 October 1998;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Indian who was born on 28 September 1937, joined the WHO's Regional Office for South-East Asia (SEARO) in February 1988 as a secretarial assistant at grade ND.5 (now ND.4). The Organization dismissed him for misconduct on 5 August 1996 under Staff Rule 1075.1. He would have reached the age of retirement on 30 September 1997.

On 29 January 1996 SEARO put up for competition a post, No. 5.0903, for a secretary II at grade ND.5. The complainant applied. On 19 March he had an interview with the officer in charge of the service. By a letter of 8 May the regional personnel officer told him that he had been unsuccessful.

On 13 June he gave notice of appeal to the regional Board of Appeal. In a brief dated 28 June he contended that he had suffered from the personal prejudice of the regional personnel officer and that the Organization had overlooked certain facts and acted in breach of the material rules.

In its report of 24 February 1997 the regional Board said it had found no evidence of personal prejudice. It did, however, find several flaws in the process of selection which affected all the applicants alike and so it recommended paying token compensation. By a letter of 17 March the Regional Director told the complainant that his appeal was rejected.

On 21 April he went to the headquarters Board of Appeal. In a report of 17 September the headquarters Board recommended rejecting it, and by a letter of 30 October 1997 which is the impugned decision, the Director-General told the complainant that he was endorsing that recommendation.

B. The complainant argues that the Organization failed to take account of his qualifications, experience and satisfactory record of service in the Regional Office. It also overlooked the fact that for five years he had performed duties similar to those of the post put up for competition. He relies on Staff Rule 560.2, which reads:

> "... A staff member whose performance has been satisfactory may at any time be considered for reassignment to a post of higher grade for which he has the qualifications."

In his submission it was a wrong decision to reject his application and, to boot, one at odds with Staff Regulation 4.2, which requires that promotion should satisfy the Organization's need to employ people who meet the highest standards of efficiency, competence and integrity. He is unaware of the criteria which the Organization applied in rejecting him for the post and contends that it has no promotion policy.

He says that there should have been no interview: he had already had one when appointed. Moreover, there is no rule of the WHO which requires the holding of an interview for the purpose of promotion. The interview was just a "farce" and "eyewash". After just a few minutes the interviewer found him unfit for the post although he had always had good reports on his performance.

The regional personnel officer showed prejudice and hostility towards him and together with other members of the staff subjected him to acts of violence.

The WHO took account of a fact that had nothing to do with the process of selection, namely disciplinary proceedings.

It did not keep the time limits in the internal appeal proceedings.

He asks the Tribunal to set aside the appointment of the successful internal candidate to grant him grade ND.5 – albeit, since he has reached the age of retirement "on proforma basis" – to pay him retroactively the difference in earnings from the date at which he was refused promotion, to award him damages in the amount of 100,000 United States dollars, to grant him the same amount for "mental, social and pecuniary loss" suffered by him and to allow him 10,000 dollars in costs.

C. The defendant's preliminary comments in its reply are that according to precedent promotion is at the Director-General's discretion and so no-one has any right to promotion. Moreover, the Tribunal has only a limited power of review in the matter.

The Organization cites a memorandum of 17 June 1994 from the personnel unit of SEARO to all members of the staff informing them of a new process of selection and recruitment. That is the process that was applied in this case and it guarantees objectivity in selection and equal treatment for all candidates.

The defendant says that it took due account of the complainant's satisfactory record of service. But that record is not the only material issue in choosing the right candidate. It also took account of the complainant's qualifications and experience but found that he was not the best candidate. There was therefore no breach of Staff Regulation 4.2 in rejecting his application. Nor does Staff Rule 560.2 confer any right to promotion.

The Organization challenges his statement that he used to perform duties similar to those of post 5.0903 at grade ND.5. It points out that his post was grade ND.4 and carried lesser responsibility. It did not draw mistaken conclusions from the evidence in coming to the view that he was not fit for post 5.0903.

It says that he did not suffer any personal prejudice or act of violence. In any event the incidents he is referring to did not occur at the time when the impugned decision was taken. Likewise the interview took place before 8 April 1996, when disciplinary proceedings began.

The Organization points out that it filed its replies to his internal appeals within the deadline set by the regional and headquarters Boards of Appeal. Besides, that is an issue of concern only to the internal appeal bodies themselves.

D. In his rejoinder the complainant presses his pleas and his claims. He points out that the Organization recruited him in 1988 and is mistaken in applying to him rules on recruitment and selection which did not come into force until 1994. The only material rules are Staff Regulation 4.2 and Staff Rule 560.

In his submission the Organization failed to state the reasons why it found him unfit for the post he had applied for. He says that the WHO was wrong to treat the interview as the only relevant criterion for promotion and it made arbitrary use of the interview. Several staff members have got personal promotion or had their posts regraded in breach of the material rules. In his submission the WHO had decided as early as January 1996 to start disciplinary proceedings against him for dismissal.

E. In its surrejoinder the defendant contends that the process of selection and recruitment at SEARO did apply to the complainant, and it provides for interviews. In January 1996 the WHO had not yet decided to dismiss the complainant. It did not do so until July 1996 on the conclusion of disciplinary proceedings started on 8 April 1996, by which date he had already had his interview for post 5.0903.

CONSIDERATIONS

1. The complainant is appealing against his non-selection for a post, numbered 5.0903 and graded ND.5 in the Regional Office for South-East Asia (SEARO) of the World Health Organization.

2. After publication of a vacancy notice for the post the complainant applied and was interviewed but was screened out at the interview stage because the interviewer found him "unsuitable". His appeals to the regional and headquarters Boards of Appeal were both unsuccessful.

3. In a scattergun approach the complainant takes issue with almost every aspect of the selection process, including the procedure followed, the qualifications of the interviewer, the conclusions reached, bias and personal prejudice against him, consideration of extraneous factors, the validity of promotion policy and the proceedings before the Boards of Appeal.

4. Most of the complainant's arguments may be quickly disposed of. His attack upon the validity of SEARO's "Selection and Recruitment Procedures", as set out in a memorandum dated 17 June 1994 from the Regional Office to all staff, is wholly without merit. Those procedures were clearly applicable to a promotion such as that sought by the complainant and were properly applied. Likewise, his submission that the interviewer was not qualified and that the entire process was "eyewash" is simple hyperbole. His contention that he was not informed of the factor ratings used to support the conclusion that he was unsuitable is meaningless since the factor-rating system was abolished with the coming into force of the new procedures for appointment and recruitment in 1994. There is no persuasive evidence to support his allegations of bias and personal prejudice.

5. Finally, the complainant's allegations of improper procedures before the regional and headquarters Boards of Appeal and about the roles played by the Regional Director and the Director-General in making the impugned decision are without merit: the procedure before internal appeal bodies is within the purview of those bodies and the authority of the Regional Director and the Director-General flows directly from the applicable rules.

6. The true nature and substance of the complainant's case is that, because he had a satisfactory work history in SEARO and because he considers himself to be well qualified for the post which he sought, his non-selection was necessarily an error. The selection of candidates for promotion is necessarily based on merit and requires a high degree of judgment on the part of those involved in the selection process. Those who would have the Tribunal interfere must demonstrate a serious defect in it; it is not enough simply to assert that one is better qualified than the selected candidate. A good performance record and satisfactory appraisals are almost always a necessary precondition to promotion but the fact that a candidate has them

is obviously not a guarantee that he or she is the most qualified candidate. The fact that despite satisfactory performance, qualifications and experience a candidate is not selected for promotion is not evidence that those factors were ignored by those responsible for making the selection. Likewise, satisfactory performance at one grade, in this case ND.4, is not in itself an assurance that a candidate will be able to fulfil the more onerous duties of a higher grade. It may be presumed that every candidate who applies for a post at a higher grade believes sincerely that he or she is qualified for that post, but that does not constitute evidence of such qualification and even less does it provide grounds for setting aside the selection of another candidate.

7. The complainant having failed to demonstrate that the impugned decision was wrong in either law or fact, the complaint must be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 6 November 1998, Mr. Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-SIXTH SESSION

***In re* Kalla** **Judgment 1828**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms. Kristin Anne Kalla against the World Health Organization (WHO) on 21 January 1998, the WHO's reply of 24 April, the complainant's rejoinder of 28 August and the Organization's surrejoinder of 19 October 1998;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant is a citizen of the United States who was born in 1964. She joined the WHO's staff in July 1996 under a short-term contract for one month as a technical officer at grade P.3 with the Global Tuberculosis Programme (GTB). Having returned to the United States, she received the offer of another short-term contract, to run from 2 September 1996 to 31 July 1997, again as a technical officer with the Programme.

She left Boston, in the United States, on 28 August 1996 on the first leg of her journey to her duty station, which was Geneva. On 4 September she put in a travel claim for 446 United States dollars by way of reimbursable expenses for excess baggage and certified the amount to be "true and correct". By a memorandum of 4 September the Director of GTB asked the head of Associates, Short-term Professional Staff and Consultants (ASC) to authorise refund of the cost of 273 kilograms of excess baggage for her and submitted a copy of her excess baggage ticket. On 11 September the head of ASC recommended allowing her 20 kilograms under Manual provision II.11.460. By a memorandum dated 20 September 1996 the chief of Finance told the Director of GTB that because of discrepancies in the baggage ticket she might, he feared, have been "wrongly charged" and he asked for copies of her credit card statement or payment authorisation slip. In a memorandum of 14 October she reported that the credit card company "appears" to have charged her 219 United States dollars, and she attributed the error "to a discrepancy on either the receipt provided to me or on [the company's] bill".

In a memorandum to her of 18 October the head of Claims Examination (CLX) said that her reply of 14 October was "not adequate" and he gave her eight days in which to submit proper supporting documents and explain the difference between what she had paid and what she had claimed. On 22 October she attached travel documents and a statement from her credit card company to a memorandum saying that she had paid a total of $219, including $73 for her pet cat, which she was taking with her. She said that under the stress of departure she had failed to check the receipt; she was not familiar enough with the metric system to realize that the weight entered on it was too large; either she had been "given the wrong handwritten receipt, or the ticket agent incorrectly marked the ticket".

By a letter of 29 October the Director of the Division of Personnel charged her with "wilful falsification of documents with the intention of defrauding the Organization" and asked her to comment in writing within eight days; he also suspended her from duty without pay as at 30 October pending review of her comments and the results of further investigation. She submitted an explanatory affidavit on 7 November under cover of a letter asking the Director of Personnel to lift the suspension. By a letter of 15 November the Director told her that the suspension held good.

In a letter dated 18 December 1996 the Director set out the findings of the investigation. He told her, among other things, that the statements backing her claim were not "true and correct", that the top copy of the baggage ticket showed a cost of $146, that the duplicate copy alone had been changed to a total cost of $446; that she had charged only $146 to her credit card; and that the figure for "rate per kg or piece" had been changed from "73.00" to "273.00 kg". He concluded that she had tampered with her copy of the ticket and used it with intent to defraud. Since such action amounted to misconduct, the Assistant Director-General had decided to dismiss her under Rule 1075.1 with payment of one month's salary in lieu of notice.

She appealed to the headquarters Board of Appeal on 14 February 1997. In a report of 18 August 1997 the Board recommended letting her resign as at 30 October 1996 provided she dropped any legal action against the Organization in consideration for withdrawal of the decision of 18 December to terminate her appointment. By a letter of 23 October 1997, which she is impugning, the Director-General upheld the decision of 18 December 1996 terminating her appointment.

B. The complainant submits that she was wrongfully dismissed and her good name besmirched. She has three main pleas.

First, she pleads misapplication of the Staff Regulations and Rules. She charges the Board with breach of Staff Rule 1075.1 in failing to find evidence of wilful deception. Instead it applied a "standard of negligence". She denies that there was a set of "precise and concurring presumptions" that might shift the burden of proof to her and rule out the possibility of error. As the case law says, dismissal is far too drastic a punishment for the staff member not to have the benefit of the doubt. In any event the punishment was out of proportion to the alleged offence, the more so as the amount at stake was but a fraction of the thousands of dollars she had spent to ship her belongings to Switzerland. By failing to tell her why it was suspending her from duty the Administration was in breach of Rule 1120. Besides, suspension was unwarranted.

Secondly, she pleads neglect of the material facts. There were many to which the Board and the Director-General failed to pay proper heed: her lack of motive for fraud, her unfamiliarity with her new employer's administrative procedures, turmoil at the airport, muddle over whether she might take the cat with her, inconsistencies in the baggage ticket, her untarnished reputation, her apology to the Administration for causing it inconvenience and her willingness to cooperate. Such facts leave open the possibility of "mere error or negligence".

Lastly, she blames her dismissal on personal prejudice. Since her supervisors differed with her over matters like "gender" she attributes the harsh treatment to considerations that had nothing to do with work.

She wants the Tribunal to quash the impugned decision and order the WHO to (1) write her a letter declaring her "innocent of any wrongdoing" and a victim of "improper" dismissal; (2) pay her the salary and benefits she would have had if she had been able to serve out her contract and (3) grant her a total of $40,000 in moral damages under four heads, including the breakdown of her marriage ($10,000) and her bankruptcy (a further $10,000). She claims $25,000 in costs, interest at a rate to be set by the Tribunal on the sums due, and the award of "all other and further costs" as the Tribunal may order.

C. The WHO replies that her complaint is devoid of merit. It observes that she alone was responsible for the accuracy of a claim she had submitted as "true and correct". Hers was not a case of clerical error or mere negligence: there was a set of precise and concurring presumptions that she had tampered with her copy of the excess baggage ticket and used it to back an inflated claim. That her copy of the ticket had been altered was plain from the top copy, which the Organization produces.

It denies committing any procedural mistakes. At every stage in the proceedings it let her have her say. Suspension was a proper exercise of discretion.

As to proportionality, there was no inference of "mere error": this was a case of intent to defraud. There is, it submits, no threshold below which fraud may be overlooked, certainly not during the early days of an official's contract. It took full account of the effect of dismissal on her career. But the seriousness of the offence and the need to safeguard its own interests outweighed such subjective considerations. Besides, she had only to resign if she so wished after getting notice of dismissal.

As to personal prejudice, there was no evidence of any against her and the officers she singles out had no part in the impugned decision.

The Organization sees no grounds for her claims to redress. Her marital and financial troubles are irrelevant.

D. In her rejoinder the complainant enlarges on her earlier pleas and rebuts the arguments in the WHO's reply. The Organization was, she says, in breach of due process by failing to let her know that it had the top copy of the baggage ticket: it had a duty to inform her of any evidence it got from the airline company. Owing to the existence of a "cap" on the amount payable to her under the rules for excess baggage it would not have been possible for her to defraud the Organization. She presses her claims, including those to damages for her divorce and financial plight, the "effective cause" of which was the WHO's wrongful treatment of her.

E. In its surrejoinder the WHO confines comment to the main arguments in her rejoinder. It denies breach of due process: disclosure of the top copy of the ticket did not amount to a new element, but merely confirmed that the document had been tampered with. As to the existence of a cap on refund of the cost of excess baggage, the Organization points out that the material question is not whether such cap – had there been one – might impede fraud, but whether there was intent to defraud. And, it concludes, there was.

CONSIDERATIONS

1. The World Health Organization recruited the complainant in the summer of 1996 as a technical officer at grade P.3 under its Global Tuberculosis Programme (GTB) at headquarters in Geneva. At the outset she had a contract for one month. She then got a new one from 2 September 1996 to 31 July 1997. To take up duty under the new contract she travelled on flights from Boston to Frankfurt and then to Geneva on 28 August 1996 by the German airline, Lufthansa.

2. On 4 September 1996 she submitted to the Organization a claim to refund of $446 to cover the cost of excess baggage and with it an excess baggage ticket in which the "rate per [kilogram] or piece" had been altered from "73.00" to "273.00" and the cost from "USD146" to "USD446".

3. A memorandum of 20 September 1996 from the chief of Finance to the Director of GTB asked the complainant to submit her credit card statement showing the payment she had made for the excess baggage. She

replied in a memorandum of 14 October to the Director but in a memorandum of 18 October the WHO told her that her reply was "not adequate". On the 21st Lufthansa confirmed that the total amount charged to her for excess baggage had been $146, not $446. On the 22nd she submitted a letter from her credit card company confirming one payment of $73 for the transportation of her pet cat on the same flights and another of $146 for the excess baggage.

4. By a letter of 29 October the Director of the Division of Personnel told her that she was suspended from duty as from 30 October under Staff Rule 1120; charged her with "wilful falsification of documents with the intention of defrauding the Organization"; and set her, in accordance with Rule 1130, a time limit for reply, which was eight days. She replied in an affidavit dated 7 November. By a letter of 18 December 1996 the Director informed her that the Administration's conclusion was that she had wilfully falsified the copy of the excess baggage ticket that she had submitted in support of her claim and that she was dismissed for misconduct under Rule 1075.1.

5. On 14 February 1997 she appealed to the headquarters Board of Appeal and it reported on 18 August 1997. It held that, though she must go, her "personal circumstances ... were such that the effects of this dismissal on her future professional life were likely to be out of proportion with the misconduct in question". It recommended offering her "the possibility of resigning as from 30 October 1996" provided that she would "undertake no further legal action".

6. The Director-General did not accept the Board's recommendation but in a letter to her of 23 October 1997 confirmed her dismissal. That is the decision she is impugning.

7. The Tribunal disallows the complainant's application for hearings, being satisfied that they are not necessary for ruling on the case: it has full written evidence and extensive submissions from both parties.

8. The complainant has three main pleas: that the WHO failed to apply the Staff Regulations and Rules correctly; that there was incomplete

consideration of the facts; and that her dismissal was attributable to the personal prejudice against her of "a supervisor or responsible official".

The alleged disregard of the rules

9. The complainant contends that the Board did not explicitly and clearly state that the dismissal rested on "a finding of fraud, that is, wilful deception"; that thereby the Board, and so the Director-General, incorrectly applied Rule 1075; and that indeed the Board "may have applied a standard of negligence, which would be clearly wrong". She takes the Board to task for identifying as "one of the set of precise and concurring presumptions" inconsistency in the evidence, particularly the way in which the credit card payment slips had been presented to her, and she maintains that her statements are "entirely coherent" and "credible". She objects to the Board's drawing another such presumption from the fact that she "did not dispute that the excess baggage ticket had been changed" and that "no one [else] had any motive to falsify the amount". She argues that that "ignores the possibility ... of an error, which is rendered likely by the great haste in which the credit card payment was processed more than once". She believes that the Board drew yet another presumption from her failure to "produce any evidence to indicate that she had not falsified the document" supporting her claim. She says that that is to shift the burden of proof to her to disprove her alleged guilt. All she did was submit "an inaccurate excess baggage ticket and an inaccurate travel claim under circumstances (which are not contested) in which she had no reasonable opportunity of verifying the information, was uninformed and in unfamiliar circumstances, and was rushed at every stage. This sole remaining element of the purported set of 'precise and concurring presumptions' is more consistent with negligence than with fraud". In endorsing the Board's recommendation the Director-General incorrectly applied both Rule 1075, by laying the burden of disproving fraud upon her, and Rule 1110.1, in that dismissal was a disproportionately severe sanction for the alleged offence, especially when the inference of mere error was so strong, when the amount at stake was so small, and when the personal consequences for her were so grave. Lastly, she contends that the WHO failed, in breach of Rule 1120, to give her at the time of suspension from duty a written statement of the reasons for it; it

omitted to tell her how her continuing presence might harm the Organization's interests; and in fact it was wrong to order suspension because it could not reasonably make out that her presence was likely to harm its interests.

10. The complainant cannot succeed in her contention that the Board failed to make an explicit and clear finding of fraud. In paragraph 3 of its report it recorded the fact that "her contract had been terminated under Staff Rule 1075.1 on the grounds of intention to defraud WHO". It then summed up her own and the Organization's arguments. In paragraph 8 it declared that "the issue was not just the false invoice, but rather the false travel claim", which she had certified to be "true and correct". It pointed out inconsistencies in her case. And it "agreed that WHO could not continue to employ [the complainant] following an incident of this kind", and that dismissal was the only course of action open to the Administration. The drift of the whole report is explicit and clear: the Board found the complainant guilty on the charge of basing a false claim on a falsified document with intent to defraud.

11. She must fail too in her argument that the burden was wrongly shifted to her to disprove guilt. That is not at all what the Board meant or did. It is common ground that the excess baggage ticket was falsified. The complainant had that ticket in her possession from the moment when it was handed to her at the airport in Boston until she handed it over to her secretary in the WHO in Geneva. She raises two possibilities: one is that an official of Lufthansa in Boston was the culprit, the other that there was a mere error. But it was only the bottom copy of the baggage ticket which was altered, the top copy being left as it had originally been, and the amount shown as paid on the top copy was correct. The Board refused to accept that anyone other than the complainant had any motive for falsifying the amount. It is plain what the Board meant in referring to her failure to adduce evidence to suggest that she had not falsified the ticket: the Organization had made out a *prima facie* case, and she had failed to adduce any evidence tending to rebut it. She produced a falsified document in support of a claim and certified the statement of fact in that claim to be true. The inference is

that she was responsible for the accuracy of the document, and she failed to satisfy the Board that it was by any error that she had certified the claim.

12. No more successful is her plea that the Organization misapplied Rule 1110.1, which sets out the sanctions applicable according to the gravity of the offence. The Tribunal does not accept her submission that dismissal is a sanction disproportionate to the making of a fraudulent claim on the strength of a falsified document. Even though the amount at stake was not large, an intent to defraud the Organization is a most serious offence. The Organization may expect the highest standards of integrity from its staff; it could not possibly just overlook the fraud; and there was nothing disproportionate about dismissing her for the misconduct she had committed. It is quite untrue that the Organization refused to take her own circumstances into account. Though the Director-General rejected the Board's recommendation for letting her resign instead, the Tribunal is satisfied on the evidence that he had considered her circumstances but had concluded that they could not prevail.

13. Another unsustainable plea is breach of Rule 1120 in that the WHO gave her no written statement of the reasons for suspension from duty and, more particularly, of the reasons why her continuing presence might harm its interests. On receiving the letter of 29 October 1996 from the Director of the Division of Personnel she learned that she was charged with wilful falsification of documents with intent to defraud the Organization and suspended from duty under Rule 1120. The suspension was a proper exercise of the Director-General's discretion. The reference to the rule implied plainly enough that the Organization took the view that her presence in the office was likely to harm its interests: there was no need for it to say so explicitly then or later.

The alleged neglect of material facts

14. In support of her second plea the complainant pleads that the Board and hence the Director-General erred in disregarding circumstances that suggested she had been guilty of error or negligence. She alludes to such circumstances as anxiety about missing the Lufthansa flight from Boston and

about the fate of her cat. She points out that the travel claim form was the first one she had ever had to fill up at the WHO and that she got no information or help but had to rely for the purpose on her secretary and the Division of Personnel. Again, there was an "unmistakeable inconsistency on the face of the ... baggage ticket", which put "the rate per [kilogram] or piece" at 273 kilograms and the total at $446: a mistake, surely, "not an incredibly naive attempt to defraud". Other facts overlooked were the singularity of the incident, her character references, the absence of motive, her awareness of a ceiling on her entitlement, her prompt acknowledgement of error and rectification of her claim, the absence of actual payment, her sworn statement that she had not altered the figures, and the possibility of "mere error or negligence". She submits that the decision fails to make clear the "exact misconduct finding" against her: though the charge was that she had "intentionally modified the excess baggage receipt with the intent to defraud WHO", there was, she maintains, no evidence to support it.

15. There is no evidence to suggest that the Organization failed to take any material fact into consideration. The complainant had the opportunity of putting her case fully and, as was said in 10 above, the Board summed it up fully in its report. She is quite mistaken in assuming that because not every single argument she offered was specifically mentioned it was overlooked. Again the Tribunal is satisfied that the Organization heeded her explanations, even though the Board and ultimately the Director-General rejected them as not credible.

The charge of personal prejudice

16. In support of her third plea the complainant argued before the Board that she could only infer from the refusal to listen to her case, from the "exceedingly harsh" treatment of her and from and the disproportionate penalty that a supervisor or some WHO official was acting out of personal prejudice against her. Though the Board found no evidence of such prejudice in the handling of her case she now blames the Deputy Director of GTB and her first-level supervisor. She submits that of themselves the facts demonstrate those officials' prejudice against her: *res ipsa loquitur*.

17. The two supervisors whom the complainant names had no part in the decision to dismiss her. Not only has she given their names very late in the day, but she has not yet produced a jot of evidence to suggest that either of them was behind her dismissal.

The alleged procedural flaw

18. In her rejoinder the complainant pleads a procedural flaw that was prejudicial to her right of defence. She is referring to the fact that only by the letter of 18 December 1996 from the Director of the Division of Personnel dismissing her was she told of the existence of the top page of the baggage ticket sent by Lufthansa to the Organization and allowed to see a photocopy of it.

19. Yet by a letter of 29 October 1996 the Director had already told her that Lufthansa had "confirmed that the amount charged was $146, as per copy of our enquiry and reply from Lufthansa attached". So the existence of the top page added no new element but served merely to confirm that the ticket had been altered.

20. In any event the Board went into the whole issue in great detail. As it observed in point 5 of its report, "She said that had she been given an opportunity to comment on the top form of the baggage ticket, she would have said that the changes were 'not at all understandable', but that in any case this ticket represented only a small part of her real expenses".

21. The Tribunal is satisfied that there was due process. The complainant and her counsel had ample opportunity of commenting on the item of evidence at the hearings before the Board.

22. The conclusion is that the complainant's pleas cannot be sustained and that the decision she impugns must stand. That being so, her claims to relief fail in their entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 6 November 1998, Mr. Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

A.B. Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

EIGHTY-SIXTH SESSION

In re Müller-Engelmann

Judgment 1829

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Jutta Müller-Engelmann against the European Patent Organisation (EPO) on 20 August 1997 and corrected on 14 October, the EPO's reply of 19 January 1998, the complainant's rejoinder of 15 May and the Organisation's surrejoinder of 20 August 1998;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for the hearing of a witness;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a German who was born in 1951, joined the staff of the European Patent Office, the EPO's secretariat, as an examiner at grade A3. She was stationed in Munich.

On 16 September 1996, on receiving a medical certificate from her neurologist prescribing sick leave from 11 September to 31 December 1996, the Administration ordered her to report to the EPO's medical officer for an examination on 26 September. By a memorandum of 21 September she applied to the President of the Office for permission to spend the period of her sick leave "elsewhere" than at Munich.

On 26 September she reported with her husband for the examination. Because she would agree to be examined only in his presence the attending neurologist refused to carry out the examination. By a letter of 8 October the Administration told her that the President could take no decision on her application of 21 September if the medical officer did not report. The complainant protested and the EPO again called on her to undergo examination. Under terms agreed with her on 20 November the neurologist examined her on 21 November.

In a report dated 5 December 1996 the medical officer recommended an in-patient examination at a university hospital in Munich. On 6 December the Administration sent her a copy of the report and asked her to arrange for such examination with the medical officer. Inasmuch as her entitlement to sick leave under Article 62(6) of the Service Regulations was to run out on 21 January 1997 the Director of Personnel Management announced in a letter of 10 December 1996 the start of proceedings before the Invalidity Committee. In a letter of 10 January 1997 the Director gave her until 17 January 1997 to comply with the instructions of 6 December; if she did not, the Administration would treat her absence as from 20 January as "unauthorised" within the meaning of Article 63 of the Regulations. Although she made several appointments, she missed one, cancelled another, and imposed a condition unacceptable to the medical officer. By a letter of 10 March 1997 the Administration gave her a week to make an appointment with the medical officer; failing that, her absence would be considered unauthorised. After a further warning and postponement by her of appointments set for 24 and 27 March the Director declared in a letter dated 27 March that her absence was unauthorised as from 28 March.

By a letter of 11 April 1997 she appealed to the President against the decision of 27 March. By a letter of 15 May the Vice-President in charge of the Directorate-General for Administration (DG4) told her that he had put her case to the Appeals Committee.

By a letter of 21 May the Director told her that since she was to exhaust her entitlement to annual leave by 4 June the Administration would no longer pay her salary as from 5 June. By a letter of 19 June a personnel officer informed her that she must pay both her own and the EPO's contributions to the social security scheme.

She infers rejection from the EPO's failure to answer the claims in her appeal of 11 April, which she says she notified to the Administration on 16 April 1997.

B. The complainant submits that her complaint is receivable under Article VII(1) of the Tribunal's Statute because she had reason to believe that the Appeals Committee would not report on her internal challenge within a reasonable period of time. In any event it is receivable under VII(3) since the President of the Office failed to act within the time limit of two months in Article 109(2) of the Service Regulations.

On the merits she charges the EPO with breach of its duty of care by failing to provide a healthy workplace. She blames her illness on dangerous pollution at the EPO and alleges breach of Article 3 of the Universal Declaration of Human Rights and of "international labour law". She takes the Administration to task for denying her, without explanation, the opportunity of seeking treatment in a better clime.

She seeks the quashing of the decisions of 27 March, 21 May and 19 June 1997; payment of salary due as from 5 June 1997 plus interest at 4 per cent a year and of the EPO's contributions for her social security and pension entitlements; and the production of information – certified "correct and complete" – on past and future levels of "harmful substances" in the complainant's office and communal premises in the building where she works at Munich. She claims awards of moral damages of not less than 10,000 German marks and costs.

C. In its reply the EPO contends that her complaint is irreceivable because she failed to exhaust the internal remedies open to her. There were no grounds for her assuming that the Appeals Committee might have taken more than reasonable time to report on her case. The only claim she put forward in her internal appeal was to the quashing of the decision declaring her absence "unauthorised". The others, being new, are irreceivable on that count too.

In subsidiary argument on the merits the Organisation says that it duly applied the material provisions of the Service Regulations and at no time impaired her dignity or rights. She does not, it observes, have an unconditional right to the presence of a third party during a medical examination. Her allegations of toxic pollution at the workplace have nothing to do with the present complaint – which is about her unauthorised absence – and she must first put them to the Invalidity Committee.

D. In her rejoinder the complainant rebuts the reply, enlarges on her pleas and alters some of her claims. She puts her costs at 12,686.93 marks.

E. In its surrejoinder the EPO observes that she has not put forward any new arguments in her rejoinder that might make it change its position. It merely corrects the factual record and enters comments on her pleas and amended claims.

CONSIDERATIONS

1. The complainant invokes Article VII(3) of the Tribunal's Statute as the source of its jurisdiction and identifies 16 April 1997 as the date at which she notified her claims to the defendant Organisation. This is clearly a reference to the complainant's internal appeal, which the Organisation received at that date. The appeal sought the following relief:

> "1. Condemnation of the Director of Personnel Management's action, i.e. to set unjustified terms under false pretences in regard to Article 89, Staff Regulations (obligation to the welfare of the employees).
>
> 2. Condemnation of the Director of Personnel Management's action, i.e. to intentionally make incorrect statements regarding Articles 62 and 90 of the Staff Regulations, as well as the circular letter No. 22, and to demand the honouring of these statements by threat of disciplinary actions (obligation to the welfare of the employees).
>
> 3. Condemnation of the Director of Personnel Management's action, i.e. preliminary to the ordered examinations, to enforce a relinquishment of rights by threat of disciplinary actions (obligation to the welfare of the employees).
>
> 4. Condemnation of the Director of Personnel Management's action, i.e. to delay the invalidity proceedings by holding in appointment a physician who does not honour a patient's rights (obligation to the welfare of the employees).
>
> 5. Nullification of the declaration of 27.03.1997 ('Unauthorized absence') from the start (Article 63 of the Staff Regulations).

> 6. Payment of all costs arising preliminary to as well as during the course of the proceedings, including especially my barrister's fees."

2. On 15 May 1997 the Vice-President in charge of the EPO's Directorate-General for Administration (DG4) wrote, after initial examination, to tell the complainant that he could not agree with her claims and that in accordance with her wishes her appeal had been submitted to the Appeals Committee.

3. When this complaint was filed, on 20 August 1997, the Appeals Committee had not reported.

4. The complainant claims the quashing not only of the administrative decision of 27 March 1997 identified in the internal appeal regarding her unauthorised absence but also of other administrative decisions relating to her employment with the defendant in the period from May 1997 to February 1998. At least one of those decisions seems also to have been the subject of an internal appeal but the record does not reveal whether or not there has been any report by the Appeals Committee.

5. Any challenge to administrative decisions which were rendered with regard to the complainant after the filing of the first internal appeal but which were not the subject of further internal appeals is irreceivable: such decisions are not final, the complainant not having exhausted all existing means of resisting them as Article VII(1) of the Tribunal's Statute requires.

6. There remains the administrative decision of 27 March 1997 - relating to unauthorised absence - which the complainant asks the Tribunal to review notwithstanding that the internal appeal procedure has not been completed. The Tribunal's case law has it that where the pursuit of the internal remedies is unreasonably delayed the requirement of Article VII(1) will have been met if, though doing everything that can be expected to get the matter concluded, the complainant can show that the internal appeal proceedings are unlikely to end within a reasonable time: see Judgments 1243 (*in re* Birendar Singh No. 2) under 16, 1404 (*in re* Rwegellera) under 8, 1433 (*in re* McLean) under 4 and 6, 1486

(in re Wassef No. 8) under 11 and 13, 1534 (*in re* Wassef No. 14) under 3 and 1684 (*in re* Forté) under 3.

7. The complainant's internal appeal was received by the Organisation on 16 April 1997. Her statement is lengthy and has 24 annexes. Less than a month later the Vice-President completed his initial assessment of her claims and referred the matter to the Appeals Committee. She filed this complaint just over three months later.

8. The Tribunal holds that at the date of filing the present complaint the internal appeal process had not been unreasonably delayed and there was no indication that it was unlikely to come to an end within a reasonable time. That part too of the complaint is therefore irreceivable.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 13 November 1998, Mr. Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

A.B. Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

EIGHTY-SIXTH SESSION

***In re* Weber** **Judgment 1830**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss Christine Weber against the United Nations Industrial Development Organization (UNIDO) on 13 January 1998 and corrected on 30 January, UNIDO's reply of 11 May, the complainant's rejoinder of 29 July and the Organization's surrejoinder of 5 October 1998;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The background to the case is much as described in Judgments 1772 (*in re* Tueni) and 1782 (*in re* Zaunbauer).

The complainant is an Austrian who was born in 1944. In April 1974 she joined the staff of UNIDO, which at the time was a subsidiary body of the General Assembly of the United Nations. The Organization appointed her to a post as secretary at grade G.5, which would nowadays correspond to G.4. In 1978 it granted her a permanent appointment and in 1986 transferred her to the Public Relations and Information Section which later became the Public Information Section. It reformed its structure and reduced staff. On 1 January 1994 it transferred the complainant to the Small and Medium Enterprises Branch. In February 1994 it converted her appointment to a half-time one. She appealed to the Joint Appeals Board, to which went

Miss Zaunbauer's appeal as well. The Board recommended reinstating her in full-time employment, the Administration cancelled its decision and the complainant withdrew her appeal.

In August 1995 the Organization was again in financial trouble, the United States having slashed its contribution. It made further cuts in staff. It declined to renew any short-term contract or any fixed-term appointment for less than one year. It then brought in a scheme for "voluntary departure" and some compulsory measures. The complainant did not apply for termination. By a memorandum of 26 February 1996 the Managing Director of the Human Resource, Enterprise and Private Sector Development Division told her that her post was to be abolished and that it would be up to the Advisory Group on Human Resource Planning, which had been at work since August 1995, to recommend to the Director-General whether to transfer or dismiss her.

By a memorandum of 20 May 1996 the chairman of the Advisory Group told her that the Group was to recommend ending her appointment at 21 June 1996. By a letter of 21 May she exercised her right of "informal recourse" under the procedure to ask the Advisory Group to reconsider. By a letter of 19 June the Director of Personnel Services informed her of the Director-General's decision to dismiss her at 28 June 1996. On the 26th she appealed against that decision to the Director-General and by a letter dated 19 August 1996 the Director of Personnel Services answered on the Director-General's behalf that the decision was confirmed.

The complainant appealed against that decision in a letter of 14 October 1996. In its report of 15 October 1997 the Joint Appeals Board recommended rejecting her appeal but proposed that both Organization and complainant should continue to pay contributions to the United Nations Joint Staff Pension Fund until she qualified for early retirement, i.e. up to 31 January 1999. In a letter which the Director-General sent to the secretary of the Joint Appeals Board on 13 November 1997 he accepted the recommendation for rejecting the appeal and the proposal for making contributions to the Pension Fund. That is the impugned decision, which the alternate secretary of the Board conveyed to the complainant on 14 November.

B. The complainant submits that her post was never abolished, her duties simply being reshuffled among other members of the staff. She says that the Director-General took no precautions on her behalf, and even intended to dismiss her, in transferring her on 1 January 1994 to a "vulnerable post" in the Small and Medium Enterprises Branch.

The Organization acted in breach of Staff Rule 110.02(a) since, although she had a permanent appointment, it gave her no priority over holders of fixed-term ones. It overlooked the special circumstances of her case, such as her age and poor prospects of getting another job. It made use of the procedure for the reduction of staff to keep down the number of permanent appointments.

The complainant seeks the quashing of the impugned decision, her retroactive reinstatement in employment, and payment of full salary and allowances less the terminal indemnities she has already been paid. She has a subsidiary claim to payment of an amount in damages equivalent to the salary and allowances she would have earned from the date of termination up to 31 January 1999, the date at which she was to qualify for early retirement. She also seeks costs.

C. In its reply the Organization dwells at length on the procedure which the Advisory Group on Human Resource Planning went through and says that the complainant's case was given full consideration. It points out that the redistribution of her duties shows that her post had been abolished. It did not deliberately put her on a vulnerable post. Staff Rule 110.02(a) does not forbid dismissal of holders of permanent appointments. The Organization does give them priority for employment but does not guarantee it. The complainant's circumstances were taken into account but were not such as to warrant cancelling the dismissal. The procedure was to the benefit of holders of permanent appointments, and that disproves the charge of attempting to reduce them in number.

D. In her rejoinder the complainant cites Judgments 1772 and 1782. She maintains that the Advisory Group considered her for only seven posts whereas there were ninety posts held by G.4 staff on fixed-term appointments. In her submission that amounts to breach of Staff Rule 110.02(a). She challenges the reasons for rejecting her application for four of the posts. She maintains that the Organization failed to take account of the "extreme hardship" that the impugned decision caused her. She was discriminated against in that staff members who applied for voluntary departure fared far better.

E. In its surrejoinder UNIDO contends that the complainant's case differed from those that the Tribunal ruled on in Judgments 1772 and 1782. It explains that it had to renew the fixed-term appointments of ninety staff so as to keep the Organization going, although there were three times as many on such appointments at the start of 1996. It again describes in detail the procedure which led it to reject the complainant's application for the four posts she mentions. It contends that it was unable to treat the dismissed staff as well as those who left voluntarily.

CONSIDERATIONS

1. The complainant joined UNIDO in 1974 and held a permanent appointment from 1978. She contests the Director-General's decision of 13 November 1997 confirming one of 19 June 1996 to abolish her post and terminate her appointment on 28 June 1996.

2. The complainant submits that the Advisory Group on Human Resource Planning made insufficient efforts to redeploy her and failed to comply with Staff Rule 110.02(a). She refers especially to the Advisory Group's failure to consider her for "bumping" fixed-term staff members.

3. On that point it is useful to turn to two of the Tribunal's recent judgments, 1772 (*in re* Tueni) and 1782 (*in re* Zaunbauer). In those cases both the complainants had held permanent appointments in UNIDO and their posts had been abolished in the 1996 staff reduction exercise. Both relied on the Advisory Group to redeploy them and the Advisory Group eventually told both of them that their appointments would be terminated. The Tribunal held that UNIDO's decisions to terminate were in breach of Staff Rule 110.02(a) as the efforts made to redeploy the complainants had not been sufficient.

4. Mrs. Tueni was interviewed for four posts but nothing resulted. Both before and during the informal appeal procedure she asked to be considered for a post within her own unit, identical to her own, which had not been abolished and which was held by a more junior staff member. Although the Organization did subsequently consider and reject her for that post, the Tribunal held that it had not dealt with her case with thoroughness and fairness. The Advisory Group and the Joint Appeals Board had disregarded material facts in its appraisal of her in comparison to the junior staff member. Further, instead of initially considering her for the post most suitable for her the Advisory Group had sent her for interviews for four posts, three of which were either at a lower grade or required qualifications not similar to hers.

5. In Judgment 1782 the Tribunal held that Miss Zaunbauer's rights under Rule 110.02(a) had not been respected in that UNIDO had failed to ask her if she was willing to be considered for a post at a lower grade and had failed to consider her for such a post. The Tribunal further concluded that UNIDO had overlooked a material fact in that interviewers for two posts had failed to consider her latest appraisal.

6. The search for a post for the present complainant shows similar flaws. While there are of course differences of detail between the three cases the principles to be applied are the same. In particular there were flaws in the consideration of the complainant's candidature for three posts.

7. First, with regard to the complainant's interview for a post in the Public Information Section, the situation is similar to the one identified in Mrs. Tueni's case. The complainant was considered for a post in a section in which she had a great deal of experience and was compared against a more junior staff member with a fixed-term contract due to expire on 30 June 1996, just two days after her own appointment had been terminated. She had more than seven years' experience in a variety of support functions in the Public Information Section whereas the junior staff member had no more than two-and-a-half years' experience limited to secretarial duties. Her reports on her performance during her time in the Section were very positive and she exceeded the requirements stated in the original announcement of the vacancy.

8. Furthermore, the reasons provided by the chief of section for turning down the complainant's application for the position in the Public Information Section were invalid. The complainant denies the comment by the chief of section that she had "relegated the routine secretarial duties to junior colleagues", and the Organization does not refute her denial. Likewise the chief of section's observation that the complainant "does not enjoy a reputation of being an easy person" is meaningless and is belied by the consistently favourable reports on her performance in the section. Finally, the suggestion that she did not possess fluency in French is contradicted by her having passed all relevant proficiency examinations in that language.

9. In short, not only were the complainant's objective qualifications at least equal to those of the junior staff member with whom she was compared but the reasons given for rejecting her include some that were clearly unjustified.

10. Secondly, the complainant's interview for the position in Investment Services was also flawed in a manner similar to what had occurred in both Mrs. Tueni's and Miss Zaunbauer's cases. The interviewer considered immaterial facts when he reported that "the candidate's last periodic report was not encouraging"; his report was at the time in the process of being contested and the Advisory Group itself noted that for that reason the report "cannot at the present time be considered part of the record". Notwithstanding that observation the Advisory Group ended up by accepting the report as a valid rationale for the dismissal of the complainant's candidature for the post.

11. Finally, as to her candidature for the post of project secretary in Investment Services, the Advisory Group interpreted the memorandum dated 24 May 1996 from the Managing Director of the Investment and Technology Promotion Division as stating that he had himself interviewed all four candidates. But the complainant states, and the defendant does not refute, that she had never met the Managing Director or spoken to him while she was with UNIDO. The defendant's suggestion that the Advisory Group misunderstood the memorandum in question is not only implausible but,

even if true, does not help the defendant's case. On either hypothesis the Advisory Group proceeded on a patently mistaken factual basis.

12. The Tribunal concludes, as in Judgments 1772 and 1782, that the Advisory Group's efforts to redeploy the complainant were seriously flawed and violated her rights under Staff Rule 110.02(a).

13. For the foregoing reasons the decision to end her appointment is flawed and must be quashed, there being no need to take up any of her other pleas. The Tribunal will order her reinstatement as from 29 June 1996 up to 31 January 1999 - the last day of the month in which she qualifies for early retirement - and payment up to the latter date of full arrears of salary, allowances and other benefits - including employer contributions to health insurance and to the Pension Fund - less any amounts paid to her on termination and any net earnings received by her from other employment during the period from the date of termination to 31 January 1999. On account of the moral injury she has suffered the Tribunal awards her the sum of 30,000 United States dollars in damages. She is also entitled to 2,000 dollars in costs.

DECISION

For the above reasons,

1. The decisions of 19 June 1996 and 13 November 1997 are quashed.
2. UNIDO shall reinstate the complainant as from 29 June 1996 to 31 January 1999 and pay her the sums due in accordance with 13 above.
3. It shall pay her 30,000 United States dollars in damages.
4. It shall pay her 2,000 dollars in costs.
5. All her other claims are dismissed.

In witness of this judgment, adopted on 13 November 1998, Mr. Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-SIXTH SESSION

***In re* Odero-Ogwell** **Judgment 1831**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Lawi Andrew Odero-Ogwell against the Food and Agriculture Organization of the United Nations (FAO) on 18 August 1997 and corrected on 18 October 1997, the FAO's reply of 2 February 1998, the complainant's rejoinder of 3 April and the Organization's surrejoinder of 14 July 1998;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Kenyan who was born in 1936, joined the FAO in December 1968. In February 1987 it transferred him to Monrovia as its Representative in Liberia at grade D.1.

In July 1995 it had an audit done in the Representative's Office. The purpose was to look into charges of embezzlement of funds and equipment for a project, to assess the Office's performance and reputation and to carry out checks on financial and administrative operations. The undated report on the audit, which the Organization says came out in September 1995, cast doubt on the integrity of the complainant and his subordinates and accused them of fraud. It said that the Office's reputation was seriously impaired and it therefore recommended summarily dismissing the staff. A mission report dated 9 September 1995 and written by an operations officer who had just come back from Liberia bore out the findings of the audit report.

The FAO sent out three staff members to take over the Office while the enquiry was going on. They got to Monrovia on 17 September 1995. They let the complainant have a letter dated 12 September from the Director of the Office for the Coordination of Normative, Operational and Decentralized Activities (OCD). The Director asked the complainant on the Director-General's behalf to hand over to one of the three, whom he named, and to report at once to headquarters in Rome.

The complainant reported to headquarters on 22 September 1995. The Director of OCD gave him two memoranda dated 15 and 18 September. The first one said that the Director was proposing to the Director-General the dismissal of the complainant for serious misconduct, referred to "incidents" which "over the last few years" had cast doubt on the complainant's integrity and capacity for management, went into the report's findings in some detail, and gave him five days in which to answer the charges. The second memorandum was from the Assistant Director-General in charge of Administration and Finance and told him that he was suspended from duty without pay pending investigation.

He answered in a memorandum dated 29 September. He blamed his subordinates for anything that had gone wrong and said that they had taken him in. On 2 October he saw the Director of OCD, the chief of the Human Resources and Planning Service and a member of the Legal Office. On 3 October he sent to the Director of OCD an addendum to his reply of 29 September.

By a memorandum of 6 October 1995 the Assistant Director-General summarily dismissed him on the Director-General's behalf. The decision took effect the same day. A second audit report, dated October 1995, about a project supervised by the Office in Liberia confirmed poor management by the complainant and the possibility of embezzlement of project funds. He appealed against dismissal in a letter of 23 December 1995. The Assistant Director-General answered by a letter of 9 April 1996 that his claims were rejected, and he lodged an appeal against that decision on 15 June 1996.

In its report of 13 March 1997 the Appeals Committee held that he had "violated the rules and procedures of the Organization and abused his position for personal gain" and seriously damaged its reputation. It unanimously recommended rejecting his appeal. By a letter of 19 May 1997, which is the impugned decision, the Director-General did so.

B. The complainant says that the FAO failed to tell him in explicit terms the charges levelled against him and prevented him from defending his interests. The charges in the letter of 15 September 1995 from the Director of OCD did not rest on any evidence. The letter of dismissal of 6 October was null and void because it failed to state what his misconduct had been.

He contends that the Organization dismissed him on evidence he was not informed of and in disregard of his arguments. He pleads breach of the *patere legem* rule on the grounds that it failed to comply with the material provisions of the FAO Manual. In his submission it is the Deputy Director-General, not the Assistant Director-General, who was empowered to recommend his dismissal to the Director-General. He maintains that at the very worst the FAO could have accused him of failing to uncover fraud committed by others. But that did not warrant summary dismissal. The penalty was therefore out of proportion, the more so since he had had a "long and exemplary career" and Monrovia was a hardship post.

In the complainant's view the dismissal rested on mistakes of fact and wrong findings and overlooked material evidence. The reference to earlier incidents which he believed to be over and done with was in breach of the double-jeopardy rule and amounted to abuse of authority. The charges were due to personal prejudice that management and some members of the staff bore him. One of them was a consultant who had once been his subordinate and who was on the audit team. The FAO was guilty of several "administrative irregularities" that show its bad faith. It failed to meet deadlines for answering his appeal against dismissal and refused to let him see all the relevant documents.

He claims the quashing of the impugned decision; payment of salary and allowances from the date of his suspension from duty; retroactive reinstatement in his post or in an equivalent one; referral of the charges against him to the Disciplinary Committee; disclosure of many documents; and awards of 100,000 United States dollars in moral damages and 15,000 dollars in costs, plus interest at the prevailing rate.

C. In its reply the defendant contends that the hardships of working in Liberia afford no excuse for the complainant's misconduct. It sets out in detail the charges against him and maintains that despite his seniority his summary dismissal was fully warranted. The charges were in clear and precise terms. Though the letter of dismissal did not repeat them it cited the letter of 15 September 1995 from the Director of OCD, which had given chapter and verse.

The complainant had the opportunity of defending his interests both orally and in writing. As for the evidence taken in his absence, there is no need for someone facing disciplinary charges to be present when evidence is given. According to Manual paragraph 330.141 it is for the Assistant Director-General in charge of Administration and Finance to recommend dismissing a grade D.1 official. The consultant whom the complainant refers to was not a member of the audit team but accompanying it so as "to clarify his role in the management of project".

D. In his rejoinder the complainant maintains that the defendant has failed both to explain the charges against him and to discharge the burden of proof. He contends that, according to the edition he has of the Manual, it is for the Deputy Director-General to recommend sanctions against a grade D.1 official, and he accuses the defendant of letting him have a wrong version of the Manual.

E. In its surrejoinder the Organization maintains that the evidence of the complainant's guilt was "overwhelming" and that it observed due process. It points out that he had been warned that the earlier incidents were a source of "continuing concern" to it and that "his performance as FAO Representative [would] continue to be closely monitored". Lastly, it explains that he is referring to an out-of-date version of Manual paragraph 330.141.

CONSIDERATIONS

1. The complainant is impugning a decision of 19 May 1997 by the Director General of the FAO to accept the Appeals Committee's recommendation of 13 March 1997 and reject his internal appeal against his summary dismissal from the Organization on 6 October 1995.

2. The complainant had been the FAO's Representative in Liberia since 1987, except for a period of some eighteen months in 1991-92 when civil strife in that country forced the evacuation of all United Nations personnel. He ran the FAO's Office at Monrovia, which consisted of four permanent staff: himself, a programme assistant, an administrative assistant and a secretary. In May 1993 and again in May 1995 he was given written warnings regarding irregularities in the conduct of the Office for which he was responsible.

3. In July 1995 the Organization sent an internal audit team to Liberia. The team conducted an in-depth review of the Office accounts and records and followed up its findings of many discrepancies by speaking to local witnesses who had dealt with the FAO. The internal audit report, issued in September 1995, describes in detail the corruption of the Monrovia Office and its staff, including the complainant. A second report, issued by the team in October 1995 – after he had been dismissed – focused on the Office of Special Relief Operations (OSRO), a project which lasted from April 1994 to June 1995 and the purpose of which was to distribute hand tools and seeds free of charge to local farmers. While the first audit report summarised fraudulent and negligent conduct by the complainant and his staff in respect to the OSRO project, their practices were examined in greater and more damning detail in the second report.

4. On 17 September 1995 a special FAO mission arrived in Monrovia and took over the FAO's Office and bank account. The complainant was given written instructions from the Director of the Office for the Coordination of Normative, Operational and Decentralized Activities (OCD) to report immediately to headquarters in Rome. Upon his arrival in Rome he was given two memoranda dated 15 and 18 September 1995. The first memorandum was written by the Director and detailed the allegations

against him. It informed him of the Director's intention of recommending to the Director-General that he be summarily dismissed for serious misconduct. The second memorandum, which was from the Assistant Director-General in charge of Administration and Finance, said that, in accordance with Staff Rule 303.03, he was suspended without pay pending the investigation. In keeping with Manual paragraph 330.325 he was given five working days to answer the charges against him.

5. On 29 September the complainant provided a thirteen-page memorandum in reply to the charges in which he asserted essentially that he had not been aware of the frauds and irregularities practised in his Office and that his subordinates, upon whom he had relied, had been responsible for them.

6. The complainant attended a meeting on 2 October 1995 with the Director of OCD, the chief of the Human Resources and Planning Service and a representative of the Legal Office. At that meeting his reply to the allegations was discussed. After the meeting he submitted a further memorandum of reply.

7. Neither his two memoranda nor his oral presentation were found convincing. On 6 October 1995 he was informed that the Director-General had approved his summary dismissal. He appealed to the Director-General and then to the Appeals Committee. The Committee's report of 13 March 1997 recommending the rejection of his appeal was approved by the Director-General on 19 May 1997. That is the impugned decision.

8. The complainant's entire case against the impugned decision is based upon alleged procedural irregularities. While he purports to reserve his right to make submissions on the merits of the case against him, it is noteworthy that he has not actually done so. Even the memorandum which he prepared in response to the initial charges does not seek to deny that serious financial irregularities and frauds were being committed in the Office which he ran and through the bank account for which he was signatory; instead the memorandum seeks to cast the blame on subordinates and to plead that he was too busy with his other duties to be able to detect and put an end to the frauds. It is for the complainant to present his case as

he sees fit, but in the circumstances the Tribunal is unable to give effect to the "reserve" of his right to make a complete defence to the charges at some later time. The Tribunal will decide the case on the material before it.

9. The complainant's specific procedural pleas are all clearly without merit.

10. He says that the FAO failed properly to specify the charges against him. It is enough to read the memorandum of 15 September 1995 from the Director of OCD to the complainant to see that it sets out in no uncertain terms the allegations against him and provides specific examples of the alleged misconduct.

11. The complainant then states that the FAO failed adequately to give its reasons for summarily dismissing him. Here again, it is enough to read the Organization's memorandum of 6 October 1995, which refers to the memorandum of 15 September 1995 and states that, following the meeting of 2 October and consideration of all the material, the Director-General had concluded that the frauds and misconduct were such as to "gravely jeopardise the reputation of the FAO". That memorandum was more than adequate to inform the complainant of the reasons for dismissal.

12. Next he says that the Organization violated his right to make full answer and defence. While there is no doubt that such right exists, it is perfectly clear that the complainant in this case was given full opportunity to exercise such right and in fact did so. He was invited to reply to the charges against him and submitted a detailed memorandum fully setting out his position. He was then allowed the opportunity to explain and discuss his position with senior staff representatives. He was given copies of all the material which was in due course submitted to the decision-maker. After his dismissal on 6 October 1995 he was afforded full procedural protection in his appeal to the Appeals Committee, and the decision of the latter not to grant him a hearing did not impede his right to present his case fully in writing, as he in fact did. His submission that he was not permitted to examine the witnesses interviewed by the audit team is misleading: those witnesses were not examined by anyone in the decision-making structure and the decision was based solely on the reports of interviews conducted by

members of the team. The substance of those reports was made available to the complainant in the audit team report and if he wished to examine any of those witnesses he was of course quite free to do so.

13. The complainant argues that the severity of the sanction imposed was disproportionate to the alleged misconduct. Given the evidence of deep-rooted fraud and corruption in the Office for which he was responsible, the misconduct was serious and the sanction fully justified.

14. Likewise the complainant's submission that the impugned decision is based on errors of fact, omission of relevant facts and wrong conclusions is simply incompatible with the uncontradicted and overwhelming evidence.

15. The complainant submits that the impugned decision violates the double-jeopardy rule since the memorandum of 15 September 1995 mentions the two previous matters that had given rise to the letters of May 1993 and May 1995, which had been placed on his personal file. He wrongly takes the view that those prior incidents had been settled and wiped from the record by the writing of the letters in question. In fact, it is clear that the two letters were warnings which were properly placed on his file and were relevant to his conduct and to the allegations made against him in September 1995.

16. Finally, the complainant urges that the audit team was tainted with bias against him because one of the members of the team had been the international consultant on the OSRO project and the complainant had had to inform him at the conclusion of that project that his contract would not be renewed by the FAO. This is drawing a long bow indeed. Other than the complainant's own assertions there is absolutely no evidence of bias on the part of the person concerned, whose role was in any event far removed from that of the ultimate decision-maker. The allegation of bias is inherently improbable and has no foundation in fact.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 6 November 1998, Mr. Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

A.B. Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-SIXTH SESSION

***In re* Durand-Smet (No. 2)** **Judgment 1832**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Jérôme Durand-Smet against the European Patent Organisation (EPO) on 18 December 1997, the EPO's reply of 9 April 1998, the complainant's rejoinder of 14 May and the Organisation's surrejoinder of 17 June 1998;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a French citizen who was born in 1942, was seconded in 1980 from service with the French Government to the European Patent Office, the secretariat of the EPO. It has employed him since April 1983 in Directorate-General 2 (DG2), which is in Munich, and on 1 May 1989 granted him grade A4.

In 1996 he applied for an A5 post as a member of a technical board of appeal. The Director of Personnel Management told him by a letter of 8 July 1996 that he had been unsuccessful. Another A4 official, Mr. Domenico Valle, got the post. On 11 July 1996 the complainant lodged an internal appeal against that appointment and claimed the post for himself. His case went to the Appeals Committee, which reported on 5 November 1997. By a letter of 11 November, the impugned decision, the Director of Personnel

Development told him that the President of the Office had decided on the Committee's unanimous recommendation to reject his appeal.

B. The complainant is objecting to the Appeals Committee's conclusions. He submits that he qualified as long ago as 1 May 1991 for promotion to A5 whereas other patent examiners who have already had such promotion did not do so. That he sees as a breach of the rules and of equal treatment. Appointments to boards of appeal are "subjective, arbitrary and political". The Committee relied on an immaterial provision of the Service Regulations and ignored his qualifications and the outstanding reports on his performance, which since 1990 have all declared him "fit for membership of a board of appeal". The candidate who got the A5 post was neither as senior nor as seasoned. The EPO would neither let him have the minutes of the selection board's discussion questioning his attainments and behaviour nor put them in his personal file. That shows the President's prejudice against him.

He asks the Tribunal to appoint him as from 1 May 1991 to Mr. Valle's post and to award him at least 250,000 German marks in damages. He claims costs.

C. In its reply the EPO points out that the President of the Office names members of boards of appeal and its Administrative Council appoints them. Article 108(1) of the Service Regulations says that internal appeal lies to the appointing authority that took the impugned decision. Here it was the Council, but the complainant put his appeal to the President instead. So he failed to follow the internal appeal procedure properly. But since nomination by the President is the *sine qua non* of appointment the defendant takes him to be challenging the refusal to name him and will therefore treat his case as receivable.

On the merits it explains that boards of appeal are the last instance in adversarial proceedings for the grant of European patents. Their decisions are authoritative in applying the European Patent Convention. So appointing an employee to membership of one is not just promotion but another process altogether, more akin to recruitment. The President has wide discretion in deciding whom to name. So the reports on the complainant's performance and his supervisors' recurring commendations were not enough to win him nomination. The selection board thought him unequal to the task. As for the minutes of its discussion, he had the opportunity of commenting on them in the internal appeal proceedings.

Having been invited to comment, Mr. Valle says that he is "quite satisfied that the appointment fully complied with the rules of procedure and shows no error whatever".

D. The complainant rejoins that the Chairman of the Administrative Council told him that his appeal should go to the President. He argues that the EPO demands no greater qualifications for recruitment than for promotion and that the defendant is blurring the two. The selection board's findings are irrelevant because they neither square with his performance reports nor appear in his personal file. He infers acquiescence in his appeal from the curtness of Mr. Valle's comments.

E. In its surrejoinder the Organisation presses its pleas. It points out that since the minutes of the board's discussion are not a performance report there is no reason to put them on the complainant's personal file.

CONSIDERATIONS

1. Judgment 1559 of 11 July 1996 gave an account of the complainant's career and took up most of the general issues this case raises.

The complainant duly applied for a post as a member of a technical board of appeal of the EPO. By a letter of 8 July 1996 the Organisation told him that he had been unsuccessful. The post went to Mr. Domenico Valle, an Italian and an examiner of patents, who thus rose from grade A4 to A5. In an internal appeal of 11 July 1996 to the President of the European Patent Office the complainant claimed "appointment to A5 as from 1 May 1991 instead of Mr. Domenico Valle, even if that means cancelling Mr. Valle's recent promotion to A5". The President refused the claim and forwarded the appeal to the Appeals Committee. The Committee recommended rejection. The appeal was, in its view, irreceivable because it was the Administrative Council, not the President, that made appointments to technical boards of appeal. But the Committee observed that according to the material provisions of the European Patent Convention and the Service Regulations it was up to the President to put names of candidates to the Council. Refusal to name someone was a decision of the President's and one subject to internal appeal. The Committee considered whether the President had acted wrongfully in refusing to name the complainant, and it held that he had not. The President endorsed the Committee's recommendation and dismissed the appeal. That is the decision now under challenge.

The complainant is contending that the President was wrong not to name him. The gist of his case is that he wants appointment to the post and an award of not less than 250,000 German marks in damages, particularly for the moral injury he says he has been suffering "for years".

In sum the EPO presses the Committee's and the President's reasoning. It asks the Tribunal to dismiss the complaint and so, by implication, does Mr. Valle.

2. It is doubtful whether the complainant has exhausted his internal remedies as to his claim to damages. At all events the claim is almost the same as the one that he made in his first complaint and that the Tribunal disallowed in Judgment 1559 under 3. Insofar as he is now seeking the damages he was claiming in that complaint the issue is *res judicata*. And insofar as he is claiming damages for any injury he may since have suffered the Tribunal sees no reason to depart from its earlier ruling: see Judgment 1780 (*in re* Kunstein-Hackbarth) under 6(b). The claim fails.

3(a) According to Article 11(3) of the European Patent Convention it is the Administrative Council and not the President of the Office that makes appointments to technical boards of appeal, and under Article 106(2) of the Service Regulations any appeal against a decision of the Council's must go to the Council. If its answer is no, it will, in line with Articles 109(1) and 110(3), refer the case to the Appeals Committee.

Judgment 1559 held in 2 that appeal by the complainant against both the rejection of himself and the appointment of someone else lay to the Council, not to the President. The Tribunal also held the appeal to be obviously out of time. That, by implication, is why it did not remand the case to the Council.

(b) The impugned decision embraces the Committee's reasoning. It departs somewhat from that precedent by taking the view that, though the Council makes the appointment, the President may entertain an appeal against his own decision not to name someone as a candidate on the grounds that he rejects on merit and his choice of candidates is challengeable.

For the reasons set out in (1) and (2) below, that approach will square neither with the written rules nor with the purpose of an appeal by a candidate against his own rejection and the appointment of someone else.

(1) A decision will not be challengeable unless it directly affects a staff member's status in law by determining or altering it. No action will lie if some decision has yet to be taken which the staff member may challenge. Likewise, neither internal appeal nor complaint will be irreceivable if the organisation's rules say that some particular procedure must first be followed: a staff member may not challenge just one element of a complex procedure but only the decision that is the eventual outcome: see Judgment 1694 (*in re* Benaïssa) under 7(c).

The "proposal" that the President has to make for an appointment to a technical board of appeal is obviously not such a decision. The Council does not have to pick any of the President's nominees and may ask him to offer others. Besides, it was not up to the President to take at the time a "decision" of that kind or one under Article 106(1) of the Service Regulations since not until the post was filled did he tell the complainant of rejection.

Quite different is the case where the competent authority starts by discarding a batch of candidates: in that event the rejection affords a cause of action. For the start of the time limit for appeal, see Judgment 1768 (*in re* Bodar) under 4.

(2) An unsuccessful candidate may – so says precedent – challenge both the rejection of himself and the appointment of someone else on grounds of form or of substance that touch on his own application or on that of the successful candidate. And he will, at least by implication and on any reasonable construction of his claims, be challenging the appointment: see Judgment 1768 and the others cited therein. It would be awkward to have one appeal body dealing with the appointment and another with the rejection, since the two issues are or at least may be closely bound up with one another.

The terms of the impugned decision do show just such inconsistency. If the Council may rule on rejection it would be odd to let the President do so too: a conflict of views would be hard to resolve. If the Council is to prevail anyway, why make the President competent as well? Here the complainant is comparing himself and Mr. Valle on merit, and such comparison must be done, where need be, by the same authority and follow the same procedure.

The inevitable conclusion is that the Council alone is competent.

4. There is no substance to the complainant's arguments – so far as one can tell what they mean – for declaring the President competent.

The Appeals Committee said that his appeal should have gone to "the Chairman of the Council". He demurs on the grounds that Article 106(2) says that an appeal should go to the President of the Office and in any event the "appointing authority" is the President, not the Council.

Yet Article 11(3) of the European Patent Convention is crystal-clear: for members of the technical boards of appeal it is the Council that is the appointing authority. And there was nothing wrong with the Committee's saying that the appeal should have gone to the Chairman of the Council: it is ordinarily the Chairman who gets papers intended for a collegiate body.

The conclusion is that the President was wrong to treat the complainant's appeal as a challenge to the refusal to name him for appointment when it was in fact an appeal against the decision to appoint someone else.

5. The President was, however, competent to entertain the complainant's other claims. Indeed that is in line with what the Tribunal held in Judgment 1559.

But for the reasons set out in that judgment and in 2 above those claims cannot, though receivable, succeed on the merits.

6. A staff member who appeals to the wrong body does not on that account forfeit the right of appeal.

Time and again the Tribunal has held that, though rules of procedure must be strictly complied with, they must be construed with common sense and not set traps for the staff member: see Judgment 1734 (*in re* Kowasch) under 3 and the cases there cited.

For one thing, any penalty for breaking such a rule must be reasonably fitting.

The EPO has rules about competence to hear an appeal and about time limits for lodging it. If the staff member appeals in time but makes the wrong choice between Council and President, there is nothing in the rules to prevent correction of the mistake. After all, both Council and President are authorities within one and the same Organisation.

In the case that the Tribunal ruled on in Judgment 1734 the staff member had filed an appeal in time with the defendant's appeal body even though no appeal would lie. The judgment said that there was no treating that appeal as a complaint to the Tribunal and that even a timely internal appeal did not serve to meet the time limit for such complaint.

When there are two authorities that may be competent it is easy enough for one to forward a misdirected appeal to the other. If the staff member filed it in time, even with the wrong authority, then it will be receivable, and that authority will simply forward it without ado to the other one. Forwarding it will of course serve no purpose if it was filed out of time. Nor will the Tribunal afford any relief for the consequences of turning to the wrong body if the staff member knew it was the wrong one but addressed it for the purpose of pursuing some unactionable interest.

That the complainant's appeal should go to the competent body was the more reasonable because he had addressed it to the President, who could have had no difficulty over passing it on to the Council.

The conclusion is that, insofar as the Council is competent to entertain it, his appeal should go to it for decision.

7. Since the Council has not yet taken up his appeal, there is no need to rule on the merits.

DECISION

For the above reasons,

1. The impugned decision is set aside insofar as it relates to the complainant's claims challenging the rejection of his own application and the appointment of Mr. Domenico Valle.
2. To that extent the case is sent back to the Administrative Council of the EPO for decision.
3. The Organisation shall pay the complainant 1,000 German marks in costs.
4. His other claims are dismissed.

In witness of this judgment, adopted on 13 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

A.B. GARDNER

EIGHTY-SIXTH SESSION

***In re* Soltes (Nos. 1 and 2)** **Judgment 1833**

THE ADMINISTRATIVE TRIBUNAL,

Considering the first and second complaints filed by Mr. Dusan Soltes against the International Labour Organization (ILO) on 28 November 1997 and corrected on 3 January 1998, the ILO's single reply of 30 April, the complainant's rejoinder of 5 June, and the Organization's surrejoinder of 9 September 1998;

Considering Articles II, paragraph 1, and VII of the Statute of the Tribunal and Article 8 of its Rules;

Having examined the written submissions and disallowed the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of Slovakia who was born in 1943, joined the staff of the ILO on 9 July 1996. He was appointed as a computer expert at grade P.4. His contract was for a year under a project funded by the Government of Libya, and he was sent out to Tripoli.

He was granted a fortnight's annual leave from 24 September 1996 and went to Bratislava, in Slovakia. From there he sent a fax letter on 30 September to the chief of the Technical Cooperation Personnel Branch (EXPERTS) at ILO headquarters in Geneva: he asked to have that leave treated instead as sick leave on the grounds of headaches and high blood pressure which he said that drugs prescribed by a Libyan doctor had merely aggravated.

In a fax of 21 October to the chief of EXPERTS he asked for extension of his sick leave on the grounds that he needed further treatment and said that he expected to be returning to Tripoli some time between 14 and 21 November. In a telegram of 12 November the chief of EXPERTS asked him to send his medical reports to the Director of the ILO's Medical Service in Geneva, and on 14 November he did so. On 3 December he wrote a letter to the Director asking that his leaving Libya be treated as "emergency evacuation".

On 15 January 1997 he asked the Director for another four to six weeks' sick leave.

The Director wrote on 27 January granting him sick leave from 24 September 1996 but refusing his claim to "emergency evacuation". The same day the chief of EXPERTS wrote him a letter to say that he had been on annual leave from 23 November and on unpaid leave from 10 December.

On 3 February 1997 he wrote to the Director of the Medical Service objecting to the shortness of his sick leave and appealing under Article 8.6(c) of the Staff Regulations, whereby a medical referee should be named to make a recommendation to the Director.

By a letter of 12 March the Director of the Personnel Department named the medical referee. On 16 March he had a check-up in Vienna. The referee sent the ILO his findings dated 5 May; he said that the complainant had been fit since 7 December 1996 to go back to work and therefore his sick leave should have run up to 6 December 1996.

On 20 May 1997 the Director of Personnel wrote a letter informing the complainant of the referee's findings but saying that, since the Libyan Government no longer wanted him to go back to Tripoli, the ILO was ending his contract under Article 11.4.1(d)[*] but letting him have one month's pay in lieu of notice under Article 11.4.3 and a termination indemnity equivalent to six weeks' pay.

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[*] Article 11.4.1(d) empowers the Director-General to terminate the appointment of a fixed-term official "if the necessities of the service render impracticable the use of the official in the duties or at the duty station assigned to him".

In a letter of 10 June to the Director the complainant "objected" to the termination; he claimed payment of his full salary for the period from 16 January to 20 May; and asked to have the period from 10 December 1996 to 14 January 1997 treated as paid sick leave.

In a letter of 27 June the chief of the Personnel Administration Branch told him that the ILO would treat his letter of 10 June as a "complaint" under Article 13.2 of the Staff Regulations.

On 23 July 1997 he wrote to the chief of EXPERTS claiming several sums. On 29 August the chief of EXPERTS wrote him a letter confirming that he had been on sick leave from 24 September to 6 December 1996, on annual leave from 7 December to 26 December, and thereafter on leave without pay. The letter set out his total entitlements, which came to 4,831.98 United States dollars. That is the decision he is impugning in his first complaint.

In a letter of 21 September 1997 to the chief of EXPERTS he maintained that his sick leave should be extended to 15 January 1997 and that the sums were wrong.

On 10 October he submitted an Article 13.2 "complaint" to the Director-General against the termination of his contract, restating the arguments in his letter of 10 June 1997.

On 7 November he wrote to the unit that provides compensation for illness attributable to official duty: he claimed compensation under Annex II of the Staff Regulations on the grounds that he had fallen ill in Tripoli because of poor working conditions and medical treatment.

He is challenging the implied rejection of his 13.2 appeal in his second complaint, which he filed on 28 November 1997.

On 29 April 1998 the Director of Personnel replied on the Director-General's behalf rejecting the claims in his letters of 10 June and 10 October 1997.

B. The complainant says that the conditions he had to work in in Libya were so bad as to make him overwrought and induce a heart disorder and high blood pressure. The medical treatment he got there was wretched and he left in search of treatment in Slovakia, where he was on annual leave until 15 January 1997. Sure as he was that the ILO would let him go back to his duty station, he agreed to be put on unpaid leave up to 9 June 1997, though he was entitled to sick leave. But the chief technical adviser of the project had a mistakenly low opinion of his work, and that was what blocked his going back. The ILO ended his contract prematurely and without notice.

In his first complaint he asks the Tribunal to quash the decision of 29 August 1997 and award him full pay up to 24 December 1996 and half pay from 25 December 1996 to 15 January 1997. He claims full pay from 16 January to 9 June 1997 on the grounds that the ILO kept him in the dark about the possibility of his going back to Libya. He further claims under Article 11.4.3 of the Staff Regulations payment of compensation in lieu of notice of not less than six weeks at the rate prescribed in Article 3.1(d), compensation for six weeks' balance of annual leave; the refund of costs he incurred over "emergency evacuation" to Bratislava for medical treatment; a declaration that his journey to Bratislava should be treated as repatriation; refund of the costs of travel from Slovakia to Libya on 23 August 1996 for his wife and daughter or, failing that, for his daughter at least, together with an education grant for the school year 1996-97; the refund of costs of medical treatment; full recovery of his assignment grant from a bank in Libya and transfer of the sum on deposit to his bank in Bratislava; the financial compensation he claimed on 7 November 1997; and the review of two papers he wrote for the project.

His second complaint impugns the implied rejection of his claim of 10 October 1997.

In both complaints he asks for assessment by independent experts of the project he was assigned to.

C. In its reply the Organization contends that neither of his complaints is receivable.

The claim in his letter of 7 November 1997 to compensation for service-incurred illness is still under review by the Compensation Committee. Since he has failed to exhaust his internal means of redress, the claim is irreceivable under Article VII(1) of the Tribunal's Statute.

His second complaint, too, is irreceivable. He challenged the financial settlement of 29 August 1997 in his "complaint" of 10 October. According to Judgment 1611 *(in re* Pennisi), "only where the Administration has failed to take a decision upon any claim within sixty days of the notification thereof does Article VII(3) of the Statute allow direct complaint to the Tribunal". Since he lodged his second complaint with the Tribunal on 28 November 1997, only 49 days after the notification of that "complaint", it is premature.

As to the merits, the Organization refers the Tribunal to its letter of 29 April 1998 in reply to the complainant's claims of 10 June and 10 October 1997.

D. In his rejoinder the complainant rebuts the ILO's objections to receivability and maintains his pleas on the merits.

He presses his original claims and adds others. He claims material and moral damages for the ILO's denying him part of his income and harming his good name, a further award of 50,000 dollars in damages for professional injury and affront to his dignity, a written apology and another 1,500 dollars in damages for loss of personal belongings he left behind in Libya. He claims 10,000 dollars in costs.

E. In its surrejoinder the Organization contends that the complainant's further claims are irreceivable because he has failed to exhaust his internal remedies. It rebuts his pleas on the merits.

CONSIDERATIONS

1. By a letter dated 10 June 1997 the complainant submitted a series of financial claims arising out of the decision dated 20 May 1997 by his employer, the International Labour Organization, to terminate his employment with immediate effect. In particular, he asked for salary and

related entitlements for the period between 15 January 1997 – the alleged end of his sick leave and the date at which he had, he said, been ready to resume duty – and the date of the employer's decision; he also asked that the period from 10 December 1996 to 14 January 1997 should be treated as sick leave.

2. On 27 June 1997 the ILO acknowledged receipt of the complainant's letter and indicated that it was treating it as a "complaint" under Article 13.2 of the Staff Regulations. On 23 July he provided further information with respect to his claim, as the ILO had requested; in the same letter he made new financial claims.

3. In a letter of 29 August 1997 the defendant informed him of his final payments under his contract. By a letter of 21 September 1997 he disagreed with the calculation of his entitlements and resubmitted some of his earlier claims. The defendant replied to that letter on 21 October 1997.

4. On 10 October 1997 he filed another "complaint" under Article 13.2 of the Staff Regulations. It addressed the same subject as the original claims of 10 June 1997 as well as the financial claims of 23 July and 21 September 1997.

5. In a letter of 29 October the defendant acknowledged receipt of the 13.2 "complaint" dated 10 October, noted some differences between the claims of 10 June and those of 10 October, and stated that it assumed that in the case of conflict between the two the second set would prevail. The complainant replied on 10 November 1997 that they were intended to be mutually complementary and that indeed in the event of any differences, the second should prevail.

6. In the meantime, on 7 November 1997, the complainant had filed an internal claim that the ILO acknowledged that certain health problems experienced by him at the end of 1996 should be considered attributable to the performance of his official duties at Tripoli.

7. On 28 November he filed two complaints with the Tribunal. The first is directed against the decision of 29 August 1997, the second against the implied rejection of the 13.2 "complaint" of 10 October 1997. Apart from this difference and some minor variations in the documentation on the two files the two complaints before the Tribunal are identical and seek the same remedies as follows:

(1) The complainant asks that the project to which he was assigned at Tripoli should be subject to review. He applies for the hearing of witnesses to establish that it was impossible for him to complete his part of the project.

(2) He seeks recognition for compensation purposes of the fact that his state of health was due to the performance of his official duties.

(3) He makes a series of claims to sums with respect to his sick leave, his employment status and the termination of his contract.

8. The defendant wants the two complaints to be dealt with together and both declared irreceivable. As to joinder, the Tribunal holds that they should be taken together since they raise the same issues of fact and law and seek the same redress.

9. The Tribunal holds that the complaints before it are clearly irreceivable. The complainant has not exhausted his internal remedies and has not given the ILO sufficient time to respond to those matters which have formed the subject of his internal claims. In particular it is clear, and his letter of 10 November 1997 confirms as much, that his 13.2 "complaint" of 10 October 1997 subsumes and displaces the one of 10 June 1997. No other meaning can be given to his assertion that the second should prevail in the event of any difference between the two. His contention that the original claims of 10 June 1997 had gone unanswered for more than 60 days and that his complaint to the Tribunal was therefore receivable under Article VII(3) of the Statute cannot be accepted. A complainant who changes the form and content of his internal claims cannot lay on his employer the responsibility of replying to an original set of claims while still retaining whatever benefits may flow to him from an amended one.

10. Insofar as the complainant is attacking the administrative decision of 29 August 1997 his complaint is irreceivable: his letter of 21 September disagreeing with that decision was incorporated into his internal "complaint" of 10 October 1997.

11. Likewise, to the extent that he is relying on his internal claim filed on 7 November 1997 the complaints are premature and therefore irreceivable.

12. With respect to his other claims for relief which were included in neither the internal "complaint" of 10 October nor the claim of 7 November 1997, they too are irreceivable: he has failed to exhaust his internal remedies as Article VII(1) of the Statute requires.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 13 November 1998, Mr. Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

A.B. Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

EIGHTY-SIXTH SESSION

In re **Lustig de Schönstein (No. 2)** **Judgment 1834**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mrs. Sonia Lustig de Schönstein against the United Nations Industrial Development Organization (UNIDO) on 3 December 1997, UNIDO's reply of 20 February 1998, the complainant's rejoinder of 30 April and the Organization's surrejoinder of 17 August 1998;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, who is a Chilean and German citizen, joined the staff of UNIDO in 1971. Information on her career and other material facts are set out under A in Judgment 1464 of 1 February 1996. In that judgment the Tribunal dismissed her first complaint against the Organization in which she sought the quashing of a decision not to treat her intestinal illness as service-incurred.

On 1 August 1995 UNIDO put her on special leave without pay. By a letter of 25 January 1996 the Director of Personnel Services told her that in order to stay on special leave without pay she would have to provide medical certificates of inability to go back to work. He reminded her that she had failed to comply with requests for such certificates which UNIDO had sent her on 3 August, 1 September and 27 November 1995; unless she submitted a valid certificate or went back to work by 15 February 1996 the Organization would end her appointment at that date for unauthorised absence and breach of contract.

In her reply of 2 February she said that she had answered "all requests" in compliance with the rules and that the Administration had no reason "to put the blame on others" for refusing valid reasons for demanding further medical evidence. By a letter of 22 February the Director ended her appointment as at 15 February on grounds of "unauthorized absence, breach of contract and abandonment of post".

In a letter of 5 March 1996 the complainant protested to the Director that she could not be in dereliction of duty when her absence was due to poor health. Correspondence followed. On 2 July 1997 she appealed to the Director-General against the decision of 22 February 1996. By a letter dated 26 August 1997, which she got on 3 September, the Director-General told her that even though her appeal against the decision of 22 February 1996 was time-barred he found "no new elements" to warrant reversing it. That is the decision she impugns.

B. The complainant submits that the decision was in breach of Staff Rule 110.04, which required any decision on termination to be "initiated" by the Director-General himself. Here it was the Director of Personnel Services who took the decision. What is more, the Administration refused to issue a "personnel action form", the official document for an administrative decision.

She cites two new facts. One is the statement in a paper dated 12 September 1996 which was put to UNIDO's Industrial Development Board in November that "one staff member is being considered for a disability benefit under the regulations of the United Nations Joint Staff Pension Fund". Since it was she UNIDO was wrong to regard her as a former staff member. The other new fact that attests to her continuing status as a staff member is the payment of benefits after 15 February 1996 by the Temporary Disability Insurance Plan administered by the company Van Breda.

She claims the quashing of the decision notified in the letter of 22 February 1996 and reinstatement on special leave with full benefits as from 15 February 1996.

C. In its reply UNIDO does not challenge the receivability of her complaint inasmuch as she received the Director-General's reply more than 60 days after lodging her appeal.

On the merits the Organization points out that, as the Director-General told her in the impugned decision, the Director of Personnel Services terminated her appointment on his behalf and with the Director-General's prior approval. It is not UNIDO's practice to issue a personnel action form upon separation. The usual form is known as a "personnel payroll clearance action".

As to the facts she relies on the Organization points out that the official referred to in the Board's document was someone else. On that score she is mistaken. In keeping with the contract between UNIDO and the insurance company it was proper for her to receive benefits for up to 21 months under the Temporary Disability Insurance Plan she belonged to. That she continued to get benefits until April 1996 does not mean that she was still on the Organization's staff.

D. In her rejoinder the complainant comments on the reply and enlarges on her pleas. She denies that the decision of 22 February 1996 was taken on the Director-General's behalf: not until 26 August 1997 was there any mention of delegation of authority. UNIDO's chief medical officer gave her confirmation on 10 March 1997 that it was she who was being considered for disability pension. She objects to the reasons UNIDO gave for termination and accuses it of keeping information from her that might have helped her get a disability pension. She presses her original claims and further seeks awards of damages and costs.

E. In its surrejoinder the Organization observes that it has already refuted most of the pleas in her rejoinder in the reply. It produces a copy of her personnel payroll clearance action form, denies allegations of fact in the rejoinder and observes that she is under consideration for a disability benefit from the United Nations Joint Staff Pension Fund.

CONSIDERATIONS

1. The complainant impugns the decision of the Director-General of the United Nations Industrial Development Organization (UNIDO) dated 26 August 1997 refusing to review a decision of 22 February 1996 to terminate her employment on 15 February 1996.

2. The defendant Organization does not contest the receivability of the complaint since it failed to answer the complainant's earlier internal appeal within the time limit of 60 days in the applicable staff rule and in the Tribunal's Statute. She advances four arguments in support of her complaint, none of which goes to the merits of the decision to terminate her employment.

3. The complainant's first plea is that the decision to terminate was not "initiated" by the Director-General, as Staff Rule 110.04 required. There is no merit to the point. While there is no doubt that notice was given to the complainant by the Director of Personnel Services, it is abundantly clear from the documents filed that the Director-General was himself consulted beforehand and approved of that action. In the context of the Staff Rule the word "initiated" does not mean that the Director-General himself must be the first person in the Administration to take any action at all; it simply requires that the action, when taken, be on the Director-General's behalf and with his prior approval.

4. Next the complainant alleges that UNIDO did not observe the prescribed administrative formalities for the termination of her employment. The legal basis for the decision – unauthorised absence from duty within the meaning of Regulation 10.5 – is clearly set out in the letter of termination sent to the complainant. Upon separation the procedure followed by UNIDO is to complete a personnel payroll clearance action form, which sets forth the entitlements and indicates the cause of separation as well as its effective date and the leave status of the employee. The form was duly completed and dispatched to the complainant together with a computation of final payment. The Tribunal holds that in this case UNIDO adequately documented the particulars of the complainant's separation and its legal and administrative implications.

5. The complainant asserts that since the initial decision to terminate new facts have occurred which justify its revision. The first of the alleged new facts is the publication by UNIDO's Industrial Development Board of a document, dated 12 September 1996, which indicated that "one staff member is being considered for a disability benefit". The complainant sees that as a reference to her but her evidence on the point is entirely of her own creation and the Organization has provided wholly satisfactory proof that the reference is in fact to another employee.

6. The second alleged new fact is the payment to the complainant of her temporary disability benefits by Van Breda after the date of termination. Such payment is strictly in accordance with the insurer's obligations under its policy and cannot have the effect of invalidating the termination. Accordingly, the plea again fails.

7. Finally, the complainant contends that her separation was in breach of her special leave status. In August 1995 she was put on special leave without pay and advised in writing that it would be necessary to submit monthly medical reports to the chief medical officer of UNIDO so as to enable him to certify her absence from duty for health reasons. Further requests to the same effect were sent to her in letters dated 1 September, 27 November 1995 and 25 January 1996. The receipt of such reports by the chief medical officer was clearly a condition of her maintaining special leave status. Her refusal, without persuasive justification, to submit the requested information is a breach of that condition and ample indication of her intent to abandon her post.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 6 November 1998, Mr. Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

A.B. Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

*Registry's translation,
the French text alone
being authoritative.*

EIGHTY-SIXTH SESSION

***In re* Mahr von Staszewski** **Judgment 1835**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Guillermo German Rodolfo Mahr von Staszewski against the European Patent Organisation (EPO) on 2 February 1998 and corrected on 16 February, the EPO's reply of 6 May, the complainant's rejoinder of 12 June and the Organisation's surrejoinder of 25 August 1998;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, who was born in 1949, is a citizen of both Argentina and Germany. On 1 January 1991 he joined the European Patent Office, the secretariat of the EPO in Munich. At the material time he was an examiner of patents at grade A3.

On 23 October 1995 he claimed payment under Article 71 of the Service Regulations of an education allowance for his son, who was taking combined courses in engineering and economics (*Wirtschaftsingenieurwesen*) at the University of Kaiserslautern, in Germany. In its 1993 version Article 71 reads in part:

> "(1) Permanent employees entitled to the expatriation allowance - with the exception of those who are nationals of the country in which they are serving - may request payment of the education allowance in respect of each dependent child, within the meaning of the Service

> Regulations, regularly attending an educational establishment on a full time basis.
>
> (2) By way of exception, permanent employees who are nationals of the country in which they are serving or who are not entitled to the expatriation allowance may request payment of the education allowance provided that the two following conditions are met:
>
> a) the permanent employee's duty station is not less than 80 km distant from any school or university corresponding to the child's education cycle;
>
> b) the permanent employee's duty station is not less than 80 km distant from the place of domicile at the time of recruitment."

By a letter of 5 December 1995 an official of the Remuneration Department refused the complainant's claim on the grounds that the University of Munich offered courses in engineering and economics and he therefore failed to meet the condition in 71(2)(a). By a letter of 8 December 1995 to the President of the Office he appealed. He argued that Munich and other universities in Bavaria were not offering the same course as Kaiserslautern, that at Munich his son would have had to follow separate courses, one in engineering and one in economics, and that he therefore qualified for the allowance under 71(2). By a letter of 11 November 1997, the decision under challenge, the Director of Personnel Development told him that on the Appeals Committee's unanimous recommendation of 30 September the President was rejecting his appeal.

B. The complainant submits that the case turns on the construction to be put on the words "school or university corresponding to the child's education cycle" in 71(2)(a). He contends that to qualify for the same degree at the University of Munich his son would need, before reading economics, to get a diploma in engineering. For that he would have to take a purely technical course, which was not at all what he wanted and which he would have been unable to do anyway, his secondary education not being technical. So the "education cycle" offered by the University of Munich was not the same as the one available at Kaiserslautern.

The complainant points out that the EPO has granted applications for education allowances for students who because of a *numerus clausus* could not enrol at a university at the employee's duty station. The *numerus clausus* is just a "temporary limitation" that merely delays graduation. So the EPO obviously takes the view that the time needed to get a degree does matter.

And it is a criterion that is relevant to the case of the complainant's son because a degree takes much longer at Munich than at Kaiserslautern.

The complainant seeks the quashing of the impugned decision and the grant of the education allowance.

C. In its reply the EPO submits that the President's decision, being a discretionary one, is subject only to limited review. Article 71(2) applies only "by way of exception" when suitable education is unavailable at the duty station. Since Munich is an important university city the EPO puts a narrow construction on the rule: it takes the term "education cycle" to refer to the level and broad field of study, not to "subjective" criteria such as the length or substance of courses.

In applying Article 71(2) it merely checks whether the chosen courses are available at the duty station. Here the courses differ in that Kaiserslautern offers combined ones and Munich successive ones. But the degree is the same and so the length of the courses is immaterial. The *numerus clausus* bars the student from the chosen course and is therefore akin to *force majeure*.

D. In his rejoinder the complainant challenges the EPO's interpretation of Article 71. He contends that exceptions made thereunder are not at the discretion of the President, to whom the provision does not even refer. Nor is it true to say that it applies only "by way of exception" or in the case of *force majeure*. The narrow interpretation is unwarranted because the text is clear.

Citing a pamphlet from the German centre for university admissions, the complainant says that anyone who waits long enough will eventually get into the chosen university. The student just has to wait before starting study, and that affords sufficient grounds for the grant of the allowance. The complainant's son did not enrol at Kaiserslautern because of any preference of his own: he was driven to do so by *force majeure*.

E. In its surrejoinder the EPO maintains that where, as here, a provision of the Service Regulations has to be construed the matter is perforce at the President's discretion. It observes that it spoke of *force majeure* only in reference to the *numerus clausus*: it is not saying that *force majeure* is a condition of payment of the allowance. At all events it was the choice of the complainant's son to enrol at Kaiserslautern.

CONSIDERATIONS

1. The complainant joined the staff of the European Patent Office (EPO) on 1 January 1991. He is stationed in Munich.

Article 71(1) and (2) of the Service Regulations are reproduced in A above.

On 23 October 1995 the complainant claimed payment of the education allowance provided for in Article 71(2) towards the costs of his son's taking combined courses in engineering and economics (*Wirtschaftsingenieurwesen*) at the University of Kaiserslautern.

2. On 5 December 1995 the Remuneration Department refused to pay him the allowance. On 8 December 1995 he filed an internal appeal and by the decision of 11 November 1997 that is now under challenge the President of the Office rejected it.

3. The case is about the construction to be put on Article 71(2)(a). The complainant contends that he is entitled to the allowance on the grounds that his son is enrolled at Kaiserslautern for a course that is not available at Munich, his duty station. The EPO replies that the University of Munich does offer a course in engineering and another in economics and the fact that it does not combine the two disciplines into a single course does not warrant payment of the allowance.

4. The rule allows the grant of the allowance in exceptional circumstances, and how it is to be applied is at the discretion of the President of the Office. So the Tribunal will ordinarily interfere with his decision only in the exercise of its limited power of review. It will do so where the decision shows a procedural flaw or a mistake of fact or law, or overlooks some material fact, or amounts to misuse of authority, or rests on mistaken findings of fact.

5. Here the complainant is contending that the President made a mistake of law and acted arbitrarily in interpreting Article 71(2) in his case. The Tribunal is satisfied that the impugned decision does not show either of those fatal flaws: the EPO's interpretation is the right one.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 13 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

MICHEL GENTOT JULIO BARBERIS JAMES K. HUGESSEN

A.B. GARDNER

Registry's translation,
the French text alone
being authoritative.

EIGHTY-SIXTH SESSION

***In re* Liu** **Judgment 1836**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Anh-Thu Liu against the European Patent Organisation (EPO) on 3 February 1998, the EPO's reply of 24 April, the complainant's rejoinder of 20 May, the Organisation's surrejoinder of 17 June, the complainant's further brief of 12 August and the EPO's comments thereon of 31 August 1998;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, who was born in 1947, is a citizen of both Germany and Vietnam. On 1 July 1987 she joined the staff of the European Patent Office, the secretariat of the EPO, in Munich. She is an examiner of patents.

On 5 September 1996 she claimed payment under Article 71 of the Service Regulations of an education allowance for her son, who was reading economics at the University of Cambridge, in England. In its 1993 version the article says in part:

> "(1) Permanent employees entitled to the expatriation allowance – with the exception of those who are nationals of the country in which they are serving – may request payment of the education allowance in respect of each dependent child, within the meaning of the Service Regulations, regularly attending an educational establishment on a full time basis.

> (2) By way of exception, permanent employees who are nationals of the country in which they are serving or who are not entitled to the expatriation allowance may request payment of the education allowance provided that the two following conditions are met:
>
> a) the permanent employee's duty station is not less than 80 km distant from any school or university corresponding to the child's education cycle;
>
> b) the permanent employee's duty station is not less than 80 km distant from the place of domicile at the time of recruitment."

By a letter of 20 December 1996 an official of the Remuneration Department refused the complainant's claim on the grounds that the University of Munich offered courses in economics and she did not meet the condition in Article 71(2)(a). She challenged that decision in a letter of 14 January 1997 on the grounds that courses in economics were better at Cambridge than at Munich. She asked to have her letter treated as an internal appeal if her claim was rejected. By a letter of 22 January the Director of Personnel Development told her that her appeal had gone to the Appeals Committee. By a letter of 11 November 1997 – the impugned decision – he told her that on the Committee's unanimous recommendation of 30 September 1997 the President of the Office was rejecting her appeal.

B. The complainant submits that the EPO is putting too narrow a construction on Article 71(2) by referring only to the level of education – whether primary, secondary or university – and to the broad field of study – medicine, engineering, economics and so forth.

She says that she has been discriminated against. The EPO has granted applications for the education allowance for students who because of a *numerus clausus* could not enrol at a university at the employee's duty station. The *numerus clausus* is just a "temporary hurdle" that merely delays graduation. So the EPO obviously takes the view that the time needed to get a degree does matter. The British system of education enables the student to qualify sooner.

In the complainant's submission the EPO ought to have applied the criterion of language as well. Her son is a citizen of the United States and intends to live there; so it matters to him to study in English and get a degree that the United States will recognise.

The complainant seeks the quashing of the impugned decision and the grant of the education allowance.

C. In its reply the EPO submits that the President's decision, being a discretionary one, is subject only to limited review. Article 71(2) applies only "by way of exception" when suitable education is unavailable at the duty station. Since Munich is an important university city the EPO puts a narrow construction on the rule: it takes the term "education cycle" to refer to the level and broad field of study, not to "subjective" criteria such as the preferred language, the method of teaching or the length and substance of courses. Those are matters of personal choice, not exceptional circumstances. The complainant is not saying that any *numerus clausus* would bar her son from studying within a radius of 80 kilometres of Munich.

D. In her rejoinder the complainant contends that when the President does have discretion the Service Regulations say so. Here they do not. Nor is it true to say that 71(2) applies by way of exception: if the conditions are met the allowance is due. The term "school or university corresponding to the child's education cycle" must be construed in the light of EPO practice. The Organisation has not always taken a narrow view. It is indeed intending to amend the article so as to grant the allowance to more staff. To judge by criteria that the complainant believes to be objective the courses available at the University of Munich cannot be compared to those available at Cambridge.

E. In its surrejoinder the EPO maintains that where, as here, a provision of the Service Regulations has to be construed the matter is perforce at the President's discretion. It observes that it spoke of *force majeure* only in reference to a *numerus clausus* that bars the student from the chosen courses. Granting the allowance in such a case does not mean treating the length of studies as an essential criterion. Any amendment it might make to Article 71 would be irrelevant to interpreting the present rule.

F. In a further brief the complainant cites a pamphlet from the German centre for university admissions. In her view it shows that the *numerus clausus* makes getting a degree slower but is not an absolute bar.

G. In further comment the EPO contends that the pamphlet shows the time needed to graduate in a particular discipline to be unpredictable and that that bears out its case. The essential criterion is, not the length of studies, but the impossibility of enrolment. The complainant's son did not give any *numerus clausus* as the reason for his decision not to study in Munich.

CONSIDERATIONS

1. The complainant joined the staff of the European Patent Office on 1 July 1987. She is stationed in Munich.

Article 71(1) and (2) of the EPO Service Regulations are reproduced in A above.

On 5 September 1996 the complainant claimed payment of the education allowance provided for in Article 71(2) towards the costs of her son's taking the Economic Tripos at the University of Cambridge, in England. She said that the courses for which her son was there enrolled were not on a par with those available at the University of Munich, where the EPO has its headquarters.

2. On 20 December 1996 the EPO refused to pay her the allowance on the grounds that the University of Munich was offering courses in economics and she therefore failed to qualify under Article 71. She then filed an internal appeal and by the decision of 11 November 1997 that is now under challenge the President of the Office rejected it.

3. The complainant argues that for her son the education in economics that Cambridge has to offer is better than what he can get at Munich. She explains that getting into Cambridge is easier because there is no *numerus clausus* as at Munich; there he may graduate as Bachelor of Arts after only three years; the system of teaching is better; Cambridge offers special courses, for example in British economic history, which are not available at Munich; and her son would like to study in English because he is a citizen of the United States and intends to earn his living there. She also says that she has been discriminated against.

4. The defendant's case is that Article 71(2) cannot apply: the University of Munich has courses in economics and there is no reason to take account of criteria such as the length of courses or the method of teaching, let alone the student's own preferences, for example as to the language of teaching.

5. The rule allows the grant of the allowance in exceptional circumstances, and how it is to be applied is at the discretion of the President of the Office. So the Tribunal will ordinarily interfere with his decision only in the exercise of its limited power of review. It will do so where the decision shows a procedural flaw or a mistake of fact or law, or overlooks some material fact, or amounts to misuse of authority, or rests on mistaken findings of fact.

6. Here the complainant is contending that there was breach of the principle of equal treatment and that the President made a mistake of law and acted arbitrarily in interpreting Article 71(2) in her case. The Tribunal is satisfied that the impugned decision does not show any mistake of law or any arbitrariness: the EPO's interpretation is the right one. Nor has the complainant shown any breach of the principle of equal treatment.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 13 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

MICHEL GENTOT JULIO BARBERIS JAMES K. HUGESSEN

A.B. GARDNER

Registry's translation,
the French text alone
being authoritative.

EIGHTY-SIXTH SESSION

***In re* Stöckle** **Judgment 1837**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Wolfgang Stöckle against the European Patent Organisation (EPO) on 12 February 1998 and corrected on 25 March, the EPO's reply of 10 June, the complainant's rejoinder of 30 August and the Organisation's surrejoinder of 1 October 1998;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a German who was born in 1932, joined the European Patent Office, the secretariat of the EPO, in 1978 and was appointed to its office in Berlin. In 1981 he was transferred to Munich. At the material time he was employed as a grade A4 examiner of patents.

On 20 July 1995 he claimed payment under Article 71 of the Service Regulations of an education allowance for his son, who was studying engineering at the University of London. In its 1993 version Article 71 reads in part;

> "(1) Permanent employees entitled to the expatriation allowance - with the exception of those who are nationals of the country in which they are serving - may request payment of the education allowance in respect of each dependent child, within the meaning of the Service Regulations, regularly attending an educational establishment on a full time basis.

> (2) By way of exception, permanent employees who are nationals of the country in which they are serving or who are not entitled to the expatriation allowance may request payment of the education allowance provided that the two following conditions are met:
>
> a) the permanent employee's duty station is not less than 80 km distant from any school or university corresponding to the child's education cycle;
>
> b) the permanent employee's duty station is not less than 80 km distant from the place of domicile at the time of recruitment."

By a letter of 11 September 1995 an official of the Remuneration Department refused the complainant's claim on the grounds that he met neither of the conditions in 71(2). By a letter of 8 December 1995, he appealed to the President of the Office. He argued that he met both conditions: the University of London was offering combined courses, dubbed "Mechatronics", in electronics and mechanical engineering, that were not available at Munich, and at the time of recruitment he had been living in Berlin. By a letter of 11 November 1997, which is the impugned decision, the Director of Personnel Development told him that on the Appeals Committee's unanimous recommendation of 30 September the President was rejecting his appeal.

B. The complainant contends that he meets the two conditions set in Article 71(2). He argues that in 1995 the University of Munich was offering courses only in mechanical engineering and not until 1997 did it start teaching "Mechatronics", another discipline altogether. As for the second condition, he was at the time of recruitment living in Berlin, he then intended to make his permanent home there, and that city is over 80 kilometres from Munich, where he was stationed at the time he made his claim.

He maintains that his case should be treated as an "exception" within the meaning of 71(2) because the two conditions are seldom met. The Appeals Committee acted *ultra vires* by "making up implementation guidelines" for giving effect to the provision, though that is the business of the Administrative Council. He feels discriminated against in that employees who qualify under 71(1) may choose where their children are to study. It is immaterial that the EPO narrowly construes the term "education cycle" since "Mechatronics" is a distinct discipline and a distinct degree. In any event the construction should not be so narrow as to cover only "basic studies": for courses in engineering Article 71(2) would then have no effect at all.

The complainant claims the quashing of the impugned decision, the grant of the education allowance as from September 1995, when his son's courses began, and until they end, the payment of 600 German marks a month until "the decision is effective (because for the past the exact expenditures are difficult to ascertain)", interest at the rate of 10 per cent a year on any sums due, and 2,000 marks in costs.

C. In its reply the EPO submits that the President's decision, being a discretionary one, is subject only to limited review. Article 71(2) applies only "by way of exception" when suitable education is unavailable at the duty station. Since Munich is an important university city the EPO puts a narrow construction on the rule: it takes the term "education cycle" to refer to the level and broad field of study, not to "subjective" criteria such as quality or substance of courses or the method of teaching.

The EPO denies both that the Appeals Committee acted *ultra vires* and that the complainant was discriminated against. Those who get the expatriation allowance are entitled to the education allowance as well to cover the additional costs of educating their offspring in their home country.

The complainant failed to qualify under 71(2). For one thing Munich does have a "university corresponding to the child's education cycle": it offers courses in both mechanical engineering and electronics. For another, he is wrong to say that he was living in Berlin at the time of recruitment. The EPO submits the text of a letter of 26 May 1978, signed by the President and offering him the appointment: at the time he was living in Munich, and his family stayed there until he went back in 1981.

D. In his rejoinder the complainant submits that the President does not have discretion in the matter. He names several employees who did get the education allowance even though they did not qualify for it. His own case is out of the ordinary and sets no precedent. It is immaterial in applying 71(2)(a) that Munich is now offering courses of the kind his son wanted: it was not offering them in 1995. To go by the EPO's argument, which the Appeals Committee endorsed, his son would have to take two courses, one in mechanical engineering and another in electronics, and get a degree in each discipline. The complainant was living, working and resident in Munich from 1 July 1968 to 28 May 1978 and in Berlin from 29 May 1978 to 25 April 1981. By the time he was recruited – and the date given in the President's letter of 29 May 1978 was 1 June 1978 – he was already resident in Berlin.

E. The Organisation presses its case in its surrejoinder and rebuts the complainant's. It explains that the others he names were entitled to the education allowance and that in any event he may not rely on any breach there may have been of the Service Regulations. It is immaterial that his son would have had to take two courses in Munich to get the equivalent of the degree offered by London. The only relevance of that is the length of the courses, which is a "subjective" matter.

CONSIDERATIONS

1. The complainant joined the staff of the European Patent Office on 1 June 1978. He was stationed in Munich in February 1997, when he retired.

Article 71(1) and (2) of the Service Regulations are reproduced in A above.

On 20 July 1995 the complainant claimed payment of the education allowance provided for in Article 71(2) towards the costs of his son's studying "Mechatronics" at the University of London. He said that he met the two conditions in 71(2) because courses in that subject were not available in Munich and because at the time of recruitment his "place of domicile" had been Berlin and not Munich.

2. On 11 September 1995 the Remuneration Department refused to pay him the allowance on the grounds that he met neither of the conditions. He filed an internal appeal on 8 December 1995 and by the decision of 11 November 1997 that is now under challenge the President of the Office rejected it.

3. The complainant argues that in 1995 the University of Munich was not offering a degree in "Mechatronics" and only in 1997 did its technical university approve a curriculum combining courses in mechanical engineering and electronics. He further contends that from 29 May 1978 until 25 April 1981 he was living in Berlin.

4. The defendant's case is that at the time of recruitment his place of residence was Munich; that only after recruitment did he move to Berlin; and that the term "the child's education cycle" in Article 71(2) refers to basic university studies such as medicine, architecture or engineering, not to specific disciplines.

5. The rule allows the grant of the allowance in exceptional circumstances, and how it is to be applied is at the discretion of the President of the Office. So the Tribunal will ordinarily interfere with his decision only in the exercise of its limited power of review. It will do so where the decision shows a procedural flaw or a mistake of fact or law, or overlooks some material fact, or amounts to misuse of authority, or rests on mistaken findings of fact.

6. Here the complainant is contending that the President made a mistake of law and acted arbitrarily in interpreting Article 71(2) in his case. The Tribunal is satisfied that the impugned decision does not show either of those fatal flaws: the EPO's interpretation is the right one.

7. The conclusion is that the EPO acted lawfully in rejecting the complainant's claim to the allowance on the grounds that he failed to meet the condition in 71(2)(a). There is therefore no need to entertain his plea – which the defendant rebuts – that he met the one in 71(2)(b).

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 13 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

MICHEL GENTOT JULIO BARBERIS JAMES K. HUGESSEN

A.B. GARDNER

EIGHTY-SIXTH SESSION

***In re* Grover, Gupta (No. 4), Rana and Sahai**

Judgment 1838

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr. Sada Nand Grover, Mr. Shiv Raj Gupta - his fourth - Mr. Kishan Chand Rana and Mr. Debi Sahai against the World Health Organization (WHO) on 11 November 1997, the WHO's single reply of 13 February 1998, the complainants' rejoinder of 19 March and the Organization's surrejoinder of 24 June 1998;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the complaints raise the same issues of fact and of law and should therefore be joined to form the subject of a single judgment;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The WHO employs the complainants in the General Service category of staff at its Regional Office for South East-Asia (SEARO) at New Delhi. Salaries of staff in that category are set and reviewed according to the rules and method set out under A in Judgment 1160 (*in re* Banota and others).

By an information circular dated 15 May 1995 SEARO announced a revision, No. 37, of the salary scales applicable to the complainants and other General Service category staff as from 1 July 1994. In a circular of 2 June 1995 it issued an amendment to that revision, No. 37(1), which was also to take effect on 1 July 1994 and which made "small adjustments" in pay for grades ND.4 to ND.7 and raised the child allowance.

On 4 August 1995 the complainants lodged appeals against the new scales. In its report of 6 September 1996 the regional Board of Appeal found no flaws in the local survey and the findings that had afforded the basis for the revised scales, and it recommended rejecting their appeals. By letters dated 12 November 1996 the Regional Director told them that he did so. On 6 January 1997 they went to the headquarters Board. In a report dated 11 July 1997 it too recommended rejection. By letters of 12 August 1997, which they are impugning, the Director-General endorsed that recommendation.

B. The complainants submit that the WHO based the revised scales on a survey of local pay that showed fatal flaws. After the staff representatives on the Local Salary Survey Committee (LSSC) had resigned in protest at the "hasty manner" in which the survey was being done the Committee was no longer properly constituted or competent to discharge its duties. There was breach of Staff Regulation 8.1, which requires the Director-General to "make provision for staff participation in the discussion of policies relating to staff questions".

The "preparatory work" was inadequate. There were too many new "comparator" employers – i.e. the local employers taken for the sake of comparison – and some employers had a staff structure that failed to match the criteria. Taking all the employers from the financial and manufacturing sectors distorted the findings. What is more, comparisons were made with employers outside New Delhi at a time when the job market at that duty station was unstable. The job descriptions were flawed and the sample descriptions at odds with the work actually done. The questionnaire that the survey was based on was out of date. There were oddities in the new scales in that some grades contained too many steps, and yearly increments and the overlap between grades were reduced.

The complainants ask the Tribunal to quash the impugned decisions and set aside the revisions of the scales announced on 15 May and 2 June 1995. They want new scales that afford "a smooth progression of intergrade differentials by applying the weighted average increase across-the-board or in the alternative to grades ND.1 to ND.4 (NEW) from the effective date". They claim "suitable" damages for moral injury and costs.

C. The WHO replies that the revisions complied with the rules and with the principles and "methodology" of salary surveys. It denies rushing through the preparatory work: 16 months went by from the announcement of the survey until the start of interviews with local employers. It did not infringe the staff representatives' right to take part in the work of the Local Salary Survey Committee: it was they themselves who withdrew. So there was no breach of Regulation 8.1.

In any event the survey began after the questionnaire and the descriptions of "benchmark jobs" had been drawn up. The Committee itself endorsed the list of comparator employers. The complainants offer not a shred of evidence to back up their allegations of flaws in the choice of employers, the matching of jobs and the structure of the scales. Trying to shift the burden of proof to the Organization will not do.

D. In their rejoinder the complainants enlarge on their pleas and comment on arguments in the reply. They maintain that, the Committee not being competent at the material time to approve the sample job descriptions, the survey it purported to carry out was unlawful. As to the salary scales, the WHO failed to maintain "harmonious progression" from grade to grade and the transition from the earlier scales was abrupt.

E. In its surrejoinder the Organization observes that the rejoinder is a mere rehash of earlier pleas. The voluntary withdrawal of the staff representatives from the Committee neither prevented it from doing its job nor invalidated its recommendations. Besides, the staff representatives did not withdraw until the descriptions of benchmark jobs had been made. The scales duly reflected the best terms of employment at New Delhi at the time, and the differentials between grades fell within the range that the methodology allowed.

CONSIDERATIONS

1. In March 1995, after several postponements, the World Health Organization made a survey of local pay in New Delhi for the purpose of revising salary scales for staff in the General Service category employed at that duty station by agencies belonging to the common system of the United Nations. The survey was done by the Organization's Regional Office for South-East Asia (SEARO) in New Delhi, but under direction from headquarters in Geneva.

2. On the strength of the findings of the survey the WHO revised the scales of pay for General Service staff in New Delhi. By circular 16 of 15 May 1995 SEARO announced the new scales - described as Revision 37 - for its own staff. They were to apply as from 1 July 1994. Circular 18 issued minor amendments of 2 June 1995, known as Revision 37(1).

3. The complainants are members of the General Service category of the staff of SEARO: Mr. Grover has grade ND.3, Mr. Gupta ND.4, Mr. Rana ND.2 and Mr. Sahai ND.2. In their view the new scales offered them more meagre increases in pay than staff in higher General Service grades and the survey had been done in utter disregard of the manual of the Committee of the United Nations on Administrative Questions. On 4 August 1995 they lodged appeals with the regional Board of Appeal asking that the survey be declared null and void and claiming "suitable across-the-board increases in pay-scales for all grades" in their category of staff. The Regional Director rejected their appeals on 12 November 1996 on the Board's recommendation, and on 6 January 1997 they appealed to the headquarters Board of Appeal. It too recommended rejection, the Director-General agreed, and he dismissed their appeals by letters dated 12 August 1997, which are the decisions now under challenge.

The material rules

4. The material rules were in two documents. One was the "general methodology" applied by the International Civil Service Commission (ICSC) in New York for carrying out surveys of the best conditions of service at

duty stations other than headquarters. The other was the salary survey manual that the CCAQ had adopted as a guide for applying that methodology.

5. For New Delhi SEARO is what is known as the "designated agency" and the WHO the "responsible agency". The methodology and WHO Manual paragraph II.10.90 say that when a survey is to be made of local pay a body known as the Local Salary Survey Committee (LSSC) is to be set up. The chairman is to be a senior official of the designated agency and the Committee is to consist of representatives of management and staff of the United Nations agencies that employ General Service staff at the duty station. It makes the preparations for a survey, coordinates the work and reports the findings of the survey to the responsible agency, which then decides on any revision of the pay scales.

6. According to the CCAQ's manual the purpose of the surveys is to establish "the salaries and conditions of service of locally recruited United Nations staff in the General Service category ... by reference to those of the presumed best employers in the locality, without being the absolute best". The methodology provides that no more than five years should elapse between surveys. The manual sets out in the following terms the steps to be taken to prepare for a survey.

Part II, step A

> "The preparatory phase includes the monitoring of outside salary movements and the establishment of the LSSC, the selection of the jobs to be surveyed, the development of benchmark job description, the preparation of questionnaire and the establishment of the survey team. ..."

Those who carry out the survey are to get figures of local pay from a number of local employers for the sake of comparison.

Step A.1.1

> "In respect of a comprehensive survey the monitoring function serves a dual purpose: it determines whether the employers retained for the previous survey remain among the best paying in the locality, and it serves to identify potential new comparator employers ..."

Step A.2.2

> "... The work of the LSSC should commence approximately six months prior to the survey date."

The manual sets the criteria for choosing such "comparator" employers. Thus it says, under Step A.5.1:

> "(a) employers selected should represent a reasonable cross-section of competitive economic sectors (including the public service of parastatal institutions) with no one sector unduly dominating the surveys;
>
> (b) the employers to be surveyed should have been established in the locality for several years;
>
> (c) there should be a considerable degree of continuity in the employers surveyed from one survey to the next, with a majority of employers from the previous survey normally being retained for the analysis and salary scale construction;
>
> (d) the employers chosen should have both an established salary structure and a personnel system, and should preferably have at least 50 employees engaged in office work;
>
> (e) an employer who uses United Nations salary scales as the primary basis for setting salaries should not be selected for comparison."

Further guidelines appear under step C.2.5:

> "Where the comparator is a branch office of an organization with offices in a number of other cities, all data used in the computation should pertain to the locality where the salary survey is being conducted."

Lastly, the International Civil Service Commission approved as from 1 July 1993 a new "methodology" for carrying out surveys. The main changes of relevance to surveys in New Delhi were the requirements that the comparator employers should include at least seven with no fewer than 50 office employees and not more than two of those seven should belong to one and the same economic sector.

7. A working group of the LSSC drew up a list of some twenty employers for the survey in New Delhi and kept seven of them: Nocil, Glaxo, Citibank and ANZ Grindlays Bank, all of Bombay; and, from New Delhi itself, the Bank of America, American Express and Pepsico. Of those all but the first two - Nocil and Glaxo - were new: the last survey, done in 1990, had not covered them.

8. The complainants submit that the 1995 survey and the resulting scales were flawed on the following dozen grounds, which they sum up at the end of their original brief:

> The LSSC was "non-existent when vital survey exercises were undertaken".
>
> The survey was "undertaken without adequate preparations".
>
> The employers were confined to "banking/financial sector and the manufacturing sector, resulting in distorted data and job matches".
>
> They "did not meet the conditions which qualified [them] to be treated as outside employers for comparison".
>
> The survey was done at a time "when the employment market was in a state of flux and an 'ad hoc' approach should have been made".
>
> Some employers "were not chosen from the locality but from outside, rendering the data irrelevant".
>
> The descriptions of benchmark jobs "were not properly drafted", but sample descriptions offered in the CCAQ's manual were "used without comparison with the actual job descriptions".
>
> The questionnaire used for the purpose of interviewing the employers was "not revised to reflect the present-day conditions as required".
>
> The collection of data was "faulty and unreliable" as most of the employers belonged to the "banking/financial sectors where job matches were not likely to be found owing to specialised nature of work in those institutions".
>
> The new scales "violated the existing structure of the pay scales and introduced sharp fluctuations in grades".
>
> "Quantification of cash and non-cash benefits is suspect", the WHO having refused to let the complainants "inspect the survey data papers in this regard".
>
> The Organization failed to consult the staff, more particularly when, the LSSC having broken down, "the staff participation in the survey exercise was absent".

The relief that the complainants seek is the quashing of the Director-General's decisions of 12 August 1997, the cancellation of the scales, the adoption of new ones, and awards of damages and costs.

The preparatory work

9. In its reply the WHO explains that, since there must be no more than five years between surveys and the last one had been done in January 1990, headquarters began in December 1993 to prepare for doing a survey in New Delhi in May 1994. Though the preparations went ahead, the survey was held over to July 1994. By June 1994 the LSSC felt that it could not keep to the schedule, but that the preparatory work might be over by the end of September and the survey done in the first week of October. That timing did not suit everyone and the start of the survey was held over yet again, with the LSSC's agreement, to 13 March 1995. There was another postponement to 27 March. The staff representatives on the Committee wanted another eight or ten weeks, but the Organization was adamant that everything was ready and it held to 27 March. On 20 March the staff representatives stopped taking part in the Committee's work on the grounds – according to a staff union bulletin of that date – that it was:

> "... flouting the provisions of the ICSC Methodology and CCAQ Manual by embarking on an unilateral combined comprehensive survey for National Officers and [General Service] Staff in India in March 1995 disregarding the decisions of the Joint Local Committees responsible for conducting separate surveys for different categories of locally recruited staff."

10. The CCAQ's manual offers, in step A.4.4 and Annex II, a set of sample job descriptions for the purpose of ensuring "a high degree of consistency in the job descriptions" used for surveys. The LSSC found that they afforded a proper standard of comparison with jobs provided by the chosen employers. The manual says indeed in A.4.4 that the LSSC may so use the sample descriptions. The full list of job descriptions was sent to headquarters for approval on 14 March 1995, two weeks before the survey was to begin.

11. A working group of the LSSC compiled a list of 20 employers it considered to be paying the best wages in the locality. It kept some from the last survey and added others. The Committee endorsed the list and on 22 March sent it to headquarters for approval.

12. For their interviews with those employers the specialists in charge of the survey were to use a questionnaire. It is a check list of questions which are neither compulsory nor exhaustive: the specialists may add others of their own if they see fit. Though the manual says, in step A.6.2, that the questionnaire "should be analysed and revised, if necessary, to reflect the local context", the one used this time had served the purpose before without difficulty, and the Committee saw no point in changing it for the new survey.

13. The complainants submit that two items of preparatory work were left undone: writing letters to the employers to announce the survey, and sending them the questionnaire.

14. The Organization's reply is that in fact those steps were taken before appointments were made to interview the employers.

15. On the evidence the Tribunal is satisfied that the requirements of both methodology and manual were complied with. The complainants' plea on that score has no substance.

The Local Salary Survey Committee

16. The complainants plead that the staff representatives having withdrawn, the LSSC was no longer competent to act and that the Organization was in breach of its duty of consulting the staff either through such a body or else, in accordance with Staff Regulation 8.1, directly.

17. That plea too must fail. Not only did the Committee and its working party – both comprising staff representatives – function for many months before the survey began, but the Committee did not, as the complainants make out, cease to exist after the staff representatives had withdrawn. The WHO repeatedly invited them to take part, and their refusal

to do so did not have the effect of disqualifying the Committee or invalidating its recommendations. Nor was there any breach of Regulation 8.1. An analogy may be drawn with the issue that the Tribunal ruled on in Judgment 1565 (*in re* Kashmiri Lal Malhotra No. 6) under 8.

The application of the methodology

18. The complainants argue that the methodology was improperly followed in that the choice of local employers was flawed: the working party of the LSSC drew up the list of twenty and the Committee – at the time including the staff representatives – approved it. The twenty came from several sectors and were all interviewed. On the strength of the data obtained from the interviews the seven best employers were identified, and as many as three of the seven belonged to the financial sector. The Organization explains that that sector was one of the first to be "liberalized" and so was free to compete on the local market by offering higher wages.

19. It was quite in keeping with the CCAQ's manual for the survey to take the comparator employers from several sectors, provided that they were among the best employers and that no one sector was dominant. A document of the International Civil Service Commission (ICSC/37/R.18) reviews the general methodology for carrying out surveys at "non-headquarters" duty stations. It says in paragraph 121 that some employers may belong to the same economic sector provided that they account for fewer than half of the total number. And the remaining three came from three different sectors: petrochemicals, the manufacture of consumer goods, and pharmaceuticals. So no single sector was dominant, and there was a reasonably wide choice of sectors.

20. The complainants contend that the inclusion of Pepsico and Citibank in the list was a breach of the requirement in step A.5.1 of the manual that employers should have been "established in the locality for several years". The Organization replies that Pepsico had been in the

country for six years and in New Delhi for about four, while Citibank had been in India for 88 and in New Delhi for 47. The complainants do not rebut that reply, and the Tribunal finds it acceptable: the objection therefore fails.

21. The complainants argue that, contrary to the requirements of the manual, the travel division of American Express had fewer than fifty employees engaged in office work. The Organization replies that according to the information at its disposal the true number was 55. The complainants have adduced no evidence in support of their bald affirmation, which fails to discharge the burden of proof.

22. To their contention that bringing in five new employers was contrary to what is said in the manual (Step A.5.1(c)) the Organization replies that the manual requires, not that that rule be followed invariably, but merely that "a majority of employers from the previous survey" be "normally" retained for the purpose. So there was no breach of the requirement here, the seven employers chosen being the ones that paid the highest wages.

23. The complainants argue that the data did not relate to the locality; the Organization answers that they did. The Tribunal sees no reason not to accept the Organization's statement that, when it proved necessary to go to head offices in Bombay to interview some employers, care was always taken to ensure that the data related to staff in New Delhi, not in Bombay.

24. The complainants suggest that the choice of employers may have led to a mismatching of jobs and that the employers may have provided unreliable data because they have no system of grading. They do not, however, identify any particular case of such mismatching. The Organization replies that jobs were matched with due regard to the criteria set in the manual, including the functions performed and the level of supervision required. Only if the local job matched the "benchmark" job description in duties and responsibilities was it taken for the purpose of comparison. The Organization says, moreover, that all the employers confirmed that they had a grading system and did not reckon pay ad hoc. There is no evidence to suggest that the data provided were in any way unreliable.

25. The conclusion is that there was no breach of methodology or manual in carrying out the survey.

The salary scales

26. The complainants contend that the revised scales have introduced "sharp fluctuations" rather than "across-the-board" increases. The harmony of the salary structure has been destroyed by sharp increases in higher grades. They doubt that the structure of the scales duly reflected the best conditions of employment on the local market and they submit that the Organization acted in breach of the manual provision that precludes such fluctuations in pay from one set of scales to the next.

27. In reply the WHO cites step D of Part II of the manual, which under 1.4 sets out several considerations to be taken into account in setting differentials between grades. They include the following:

(1) the differential should be between 15 and 35 per cent;
(2) the percentage need not be the same at all levels; and
(3) fluctuations should normally be avoided unless local practice shows a clearly different pattern.

The Organization argues that the differentials it set were in line: they ranged from 15 to 29 per cent and so fell within the span allowed by the manual. The WHO observes that increases resulting from comprehensive surveys are commonly staggered, unlike increases due to the findings of mini-surveys, which are ordinarily applied "across-the-board". In support it cites step D.2.1 of the manual:

> "... It is preferable to avoid significant modifications to the characteristics of the scale. If however changing trends in the local economy, as reflected in the local conditions of employment, suggest that the structure of the scale needs to be revised, this may have to be considered in conjunction with the salary scale construction. ..."

The Organization points out that, whereas the survey revealed that senior General Service staff were earning much less than national counterparts and the staff of comparator employers, junior staff of the United Nations agencies were being paid more than holders of similar jobs on the local market. That is why the decision was taken to stagger the increases so as to take into proper account "trends and realities in the local economy", in line with step D.2.1, and afford a "just and equitable basis for future mini-surveys".

28. The complainants object to the new scale for having 19 steps for each grade while it is laid down that the scale should have at most 9 to 12. The Organization replies that for reasons linked to the local situation all the grades in question have since 1988 had 18 steps. That was not a result of the 1995 survey. The differentials need not be the same at all levels and may vary as local practice changes.

29. The methodology in effect at the time provides in paragraph 62:

> "The number of established steps should not be changed from survey to survey and the inter-step differential should also remain consistent unless it can be shown that local policies have changed."

The Tribunal has no reason to question the defendant's statement that the structure of the scales took account of local conditions in New Delhi, as indeed the last phrase of paragraph 62 allowed.

Application for disclosure

30. It is the complainants' "understanding" that the survey took into "computation cash as well as non-cash benefits available in some companies". To that the Organization replies that the quantification of benefits was in strict compliance with the criteria set in the manual. The complainants retort that the burden lies on the WHO to disprove their statement and apply for access to the records of the survey.

31. The Organization has refused them such access on the grounds that the data employers provide are obtained on the express condition that they are to be treated in strict confidence, employers needing an assurance that "sensitive" information on pay will not be divulged to competitors. The Organization declines to disclose to the complainants the information on the grounds that that would be in breach of privilege but it is willing to make the data available to the Tribunal.

32. The complainants offer no evidence whatever to bear out their "understanding" and enable the Tribunal to decide whether there is any sound reason for it to order disclosure. It therefore refuses to do so, a mere report of rumour or suspicion being clearly insufficient.

Conclusion

33. Since none of the complainants' pleas is upheld, the impugned decisions must stand and they are not entitled to the relief they seek.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 6 November 1998, Mr. Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

A.B. Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-SIXTH SESSION

In re **Battra (No. 3), Gaur (No. 2), Lal, Phalswal, Sethi (No. 5) and Sinha**

Judgment 1839

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr. Jogindar Singh Battra - his third - Mr. K.P. Gaur - his second - Mr. Chaman Lal, Mr. Dharam S. Phalswal, Mr. Devendra Nath Sethi - his fifth - and Mr. Rup Kishore Sinha against the World Health Organization (WHO) on 12 September 1997 and corrected between 19 and 27 November, the WHO's replies of 10 March 1998, the rejoinder entered by Mr. Battra, Mr. Sethi and Mr. Sinha on 8 May and the Organization's surrejoinder of 31 July 1998;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Considering the applications to intervene in Mr. Gaur's complaint from:

Ambigapathy, S.
Anand, P.K.
Anand, Rekha
Anand, Renu
Babu, C.S.
Bajaj, K.K.
Bajaj, S.K.
Balasubramaniam, S.
Batra, V.K.
Bhandari, R.C.
Bhatia, N.K.
Bisht, B.S.
Chand, G.
Chandra, P.
Chopra, D.
Chopra, T.R.
Das, K.
Dass, J.K.
Dass, R.
De'Souza, M.
Earland, R.
Frank, K.
Gupta, A.
Iyer, D.S.
Jagasia, N.K.
Jain, S.K.
Jayaraman, C.
Kapoor, Y.

Katyal, S.
Khanna, I.
Khanna, N.
Kohli, A.S.
Krishnan, R.
Luthra, B.
Malhotra, G.
Narula, J.S.
Pal, G.
Pal, R.
Pansar, B.
Pathak, D.C.
Pathania, G.P.S.
Pillai, G.B.
Sanghaliya, B.P.
Selvanayagam, D.
Sen, B.
Sethi, V.K.
Singh, G.
Singh, J.
Sharma, B.M.
Sharma, N.L.
Sharma, S.K.
Sharma, V.K.
Thakur, V.K.
Tokish, B.M.
Varma, V.K.
Veena, R.
Verma, J.K.
Vishwanathan, K.

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the complaints raise the same issues of fact and of law and should therefore be joined to form the subject of a single judgment;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. At the material time the WHO employed the complainants in the General Service category of staff at its Regional Office for South-East Asia (SEARO) at New Delhi. Salaries of staff in that category are set and reviewed according to the rules and method set out in Judgment 1160 (*in re* Banota and others) under A.

By an information circular of 15 May 1995 SEARO announced a revision, No. 37, of the salary scales applicable to the complainants and other General Service category staff as from 1 July 1994. In a circular of 2 June 1995 it issued an amendment to that revision, No. 37(1), which was also to take effect on 1 July 1994 and which made "small adjustments" in pay for grades ND.4 to ND.7 and raised the child allowance.

On 11 August 1995 the complainants lodged appeals against the new scales. In its report of 22 October 1996 the regional Board of Appeal found no flaws in the local survey and the findings that had afforded the basis for the revised scales and it recommended rejecting their appeals. By letters dated 8 November 1996 the Regional Director told them that he did so, and they then went to the headquarters Board. In a report dated 2 May 1997 it too recommended rejection. By letters of 6 June 1997, which they are impugning, the Director-General endorsed that recommendation.

B. The complainants submit that the WHO based the revised scales on a survey of local pay that showed fatal flaws. After the staff representatives on the Local Salary Survey Committee (LSSC) had resigned in protest at the way in which the survey was being done the Committee was no longer properly constituted or competent to discharge its duties.

The "preparatory work" too was inadequate. The descriptions of "benchmark" jobs and the list of the comparator employers taken for the purpose of the survey did not get proper approval. WHO headquarters and the LSSC did not approve the questionnaire sent to the employers, and the procedure for consulting and questioning those employers was not completed. In short, the whole exercise was a "half-baked job, resulting in half-baked and faulty data". The WHO "rushed through" the process, knowing full well that it was "trampling upon" the guidelines in the local salary manual of the United Nations Consultative Committee on Administrative Questions (CCAQ) and on the principles set out in the "methodology" of the International Civil Service Commission (ICSC). Concurrent surveys were done of the pay of General Service staff and of the employees known as "national officers". Yet the guidelines in the manual plainly preclude such concurrent surveys, which result in distortions in the comparison of jobs. There were oddities in the new scales in that some grades contained too many steps, and yearly increments and the overlap between grades were reduced. There was breach of Staff Regulation 8.1, which requires the Director-General to "make provision for staff participation in the discussion of policies relating to staff questions".

The complainants ask the Tribunal to quash the impugned decisions and set aside the scales announced on 15 May and 2 June 1995. They want the

Tribunal to order the WHO to carry out a "fresh" comprehensive survey. They claim damages for moral and material injury and costs.

C. The WHO replies that the revision complied with the rules and with the principles and "methodology" of salary surveys. It denies rushing through the preparatory work: sixteen months went by from the announcement of the survey until the start of interviews with local employers. It did not infringe the staff representatives' right to take part in the work of the LSSC: it was they themselves, including Mr. Battra, who withdrew. So there was no breach of Regulation 8.1.

In any event the survey began after the questionnaire and the descriptions of "benchmark jobs" had been drawn up. The Committee itself endorsed the list of comparator employers. The complainants offer not a shred of evidence to back up their allegations of flaws in the choice of employers, the matching of jobs and the structure of scales. Trying to shift the burden of proof to the Organization will not do. As for the concurrent surveys of pay of General Service staff and national officers, the reasons for them were explained at the time to the staff representatives. Concurrent surveys offered several advantages and were not in breach of the manual or the methodology. Indeed they are common practice at over a hundred United Nations duty stations.

D. In their rejoinder Mr. Battra, Mr. Sethi and Mr. Sinha enlarge on their pleas and comment on arguments in the reply. They maintain that, the Committee not being competent at the material time to approve the sample job descriptions, the survey it purported to carry out was unlawful. As to the salary scales, the WHO failed to maintain "harmonious progression" from grade to grade and the transition from the earlier scales was abrupt.

E. In its surrejoinder the Organization observes that the rejoinder from Mr. Battra, Mr. Sethi and Mr. Sinha is a mere rehash of earlier pleas. The voluntary withdrawal of the staff representatives from the Committee neither prevented it from doing its job nor invalidated its recommendations. Besides, the staff representatives did not withdraw until the descriptions of benchmark jobs had been made. The scales duly reflected the best terms of employment at New Delhi at the time, and the differentials between grades fell within the range that the methodology allowed.

CONSIDERATIONS

1. In March 1995, after several postponements, the World Health Organization made a survey of local pay in New Delhi for the purpose of revising salary scales for staff in the General Service category employed at that duty station by agencies belonging to the common system of the United Nations. The survey was done by the Organization's Regional Office for South-East Asia (SEARO) in New Delhi, but under direction from headquarters in Geneva.

2. On the strength of the findings of the survey the WHO revised the scales of pay for General Service staff in New Delhi. By circular 16 of 15 May 1995 SEARO, announced the new scales - described as revision 37 - for its own staff. They were to apply as from 1 July 1994. Circular 18 issued minor amendments of 2 June 1995, known as revision 37(1).

3. The complainants are members of the General Service category of the staff of SEARO: Mr. Battra has grade ND.7, Mr. Gaur ND.5, Mr. Lal ND.2, Mr. Phalswal ND.1B, Mr. Sethi ND.X and Mr. Sinha ND.6. In their view the new scales offered them more meagre increases in pay than staff in higher General Service grades and the survey had been done in utter disregard of the manual of the Committee of the United Nations on Administrative Questions (CCAQ). On 11 August 1995 they lodged appeals with the regional Board of Appeal against the new scales. The Regional Director rejected their appeals on 8 November 1996 on the Board's recommendation. They appealed to the headquarters Board of Appeal. It too recommended rejection, the Director-General agreed, and he dismissed their appeals by letters dated 6 June 1997, which are the decisions now under challenge.

The material rules

4. The material rules were in two documents. One was the "general methodology" applied by the International Civil Service Commission (ICSC) in New York for carrying out surveys of the best conditions of service at duty stations other than headquarters. The other was the salary survey manual that the CCAQ had adopted as a guide for applying that methodology.

5. For New Delhi SEARO is what is known as the "designated agency" and the WHO the "responsible agency". The methodology and WHO Manual paragraph II.10.90 say that when a survey is to be made of local pay a body known as the Local Salary Survey Committee (LSSC) is to be set up. The chairman is to be a senior official of the designated agency and the Committee is to consist of representatives of management and staff of the United Nations agencies that employ General Service staff at the duty station. It makes the preparations for a survey, coordinates the work and reports the findings of the survey to the responsible agency, which then decides on any revision of the pay scales.

6. According to the CCAQ's manual the purpose of the surveys is to establish "the salaries and conditions of service of locally recruited United Nations staff in the General Service category ... by reference to those of the presumed best employers in the locality, without being the absolute best". The methodology provides that no more than five years should elapse between surveys. The manual sets out in the following terms the steps to be taken to prepare for a survey.

Part II, step A

> "The preparatory phase includes the monitoring of outside salary movements and the establishment of the LSSC, the selection of the jobs to be surveyed, the development of benchmark job description, the preparation of questionnaire and the establishment of the survey team. ..."

Those who carry out the survey are to get figures of local pay from a number of local employers for the sake of comparison.

Step A.1.1

> "In respect of a comprehensive survey the monitoring function serves a dual purpose: it determines whether the employers retained for the previous survey remain among the best paying in the locality, and it serves to identify potential new comparator employers ..."

Step A.2.2

> "... The work of the LSSC should commence approximately six months prior to the survey date."

The manual sets the criteria for choosing such "comparator" employers. Thus it says, under Step A.5.1:

> "(a) employers selected should represent a reasonable cross-section of competitive economic sectors (including the public service of parastatal institutions) with no one sector unduly dominating the surveys;
>
> (b) the employers to be surveyed should have been established in the locality for several years;
>
> (c) there should be a considerable degree of continuity in the employers surveyed from one survey to the next, with a majority of employers from the previous survey normally being retained for the analysis and salary scale construction;
>
> (d) the employers chosen should have both an established salary structure and a personnel system, and should preferably have at least 50 employees engaged in office work;
>
> (e) an employer who uses United Nations salary scales as the primary basis for setting salaries should not be selected for comparison."

Further guidelines appear under step C.2.5:

> "Where the comparator is a branch office of an organization with offices in a number of other cities, all data used in the computation should pertain to the locality where the salary survey is being conducted."

Lastly, the International Civil Service Commission approved as from 1 July 1993 a new "methodology" for carrying out surveys. The main changes of relevance to surveys in New Delhi were the requirements that the comparator employers should include at least seven with no fewer than 50 office employees and not more than two of those seven should belong to one and the same economic sector.

7. A working group of the LSSC drew up a list of some twenty employers for the survey in New Delhi, and kept seven of them: Nocil,

Glaxo, Citibank and ANZ Grindlays Bank, all of Bombay; and, from New Delhi itself, the Bank of America, American Express and Pepsico. Of those all but the first two – Nocil and Glaxo – were new: the last survey, done in 1990, had not covered them.

8. The complainants submit in their original brief that the 1995 survey and the resulting scales were flawed on the following nine grounds:

The survey was "*ultra vires* and void" because the General Service category staff did not take part in the exercise.

The preparations for it were inadequate.

Concurrent surveys of pay were "forced upon" General Service staff and on "national officers", who are nationals of the country and locally recruited to perform – says the manual of the CCAQ – "functions of a professional nature requiring local knowledge and experience".

For the purpose of the survey there were no proper "benchmark job descriptions".

The questionnaire used in interviewing comparator employers ought to have been revised.

The selection of comparator employers was never completed; there was "preponderance" of employers in banking and manufacturing, all other sectors being left out.

The data used for the purpose of reckoning the new scales were so "half-baked" that it is doubtful whether the best prevailing local terms of employment were duly reflected in the findings of the survey. In particular -

(a) the new scales give nineteen steps for all grades but ND.X, contrary to the manual, which prescribes nine to twelve in each grade;

(b) the scales reduce the yearly step increment, though the amount of it is an acquired right and so may not be altered; and

(c) the scales are "faulty with regard to intergrade overlaps".

Because of breach of the provisions of the manual and the methodology the scales should – say the complainants – be declared null and void.

The relief that the complainants seek is the quashing of the Director-General's decisions of 6 June 1997, the cancellation of the scales, the ordering of a new survey, and awards of material and moral damages and costs.

The preparatory work

9. In its reply the WHO explains that, since there must be no more than five years between surveys and the last one had been done in January 1990, headquarters began in December 1993 to prepare for doing a survey in New Delhi in May 1994. Though the preparations went ahead, the survey was held over to July 1994. By June 1994 the LSSC felt that it could not keep to the schedule, but that the preparatory work might be over by the end of September and the survey done in the first week of October. That timing did not suit everyone and the start of the survey was held over yet again, with the LSSC's agreement, to 13 March 1995. There was another postponement to 27 March. The staff representatives on the Committee wanted another eight or ten weeks, but the Organization was adamant that everything was ready and it held to 27 March. On 20 March the staff representatives stopped taking part in the Committee's work on the grounds – according to a staff union bulletin of that date – that it was:

> "... flouting the provisions of the ICSC Methodology and CCAQ Manual by embarking on an unilateral combined comprehensive survey for National Officers and [General Service] Staff in India in March 1995 disregarding the decisions of the Joint Local Committees responsible for conducting separate surveys for different categories of locally recruited staff."

10. The CCAQ's manual offers, in step A.4.4 and Annex II, a set of sample job descriptions for the purpose of ensuring "a high degree of consistency in the job descriptions" used for surveys. The LSSC found that they afforded a proper standard of comparison with jobs provided by the chosen employers. The manual says indeed in A.4.4 that the LSSC may so use the sample descriptions. The full list of job descriptions was sent to headquarters for approval on 14 March 1995, two weeks before the survey was to begin.

11. A working group of the LSSC compiled a list of 20 employers it considered to be paying the best wages in the locality. It kept some from the last survey and added others. The Committee endorsed the list and on 22 March sent it to headquarters for approval.

12. For their interviews with those employers the specialists in charge of the survey were to use a questionnaire. It is a check list of questions which are neither compulsory nor exhaustive: the specialists may add others of their own if they see fit. Though the manual says, in step A.6.2, that the questionnaire "should be analysed and revised, if necessary, to reflect the local context", the one used this time had served the purpose before without difficulty, and the Committee saw no point in changing it for the new survey.

13. The complainants submit that two items of preparatory work were left undone: writing letters to the employers to announce the survey, and sending them the questionnaire.

14. The Organization's reply is that in fact those steps were taken before appointments were made to interview the employers.

15. On the evidence the Tribunal is satisfied that the requirements of both methodology and manual were complied with. The complainants' plea on that score has no substance.

The Local Salary Survey Committee

16. The complainants plead that the staff representatives having withdrawn, the LSSC was no longer competent to act and that the Organization was in breach of its duty of consulting the staff either through such a body or else, in accordance with Staff Regulation 8.1, directly.

17. That plea too must fail. Not only did the Committee and its working party – both comprising staff representatives – function for many months before the survey began, but the Committee did not, as the complainants make out, cease to exist after the staff representatives had withdrawn. The WHO repeatedly invited them to take part, and their refusal

to do so did not have the effect of disqualifying the Committee or invalidating its recommendations. The methodology provides in paragraph 6 that, though it is preferable to have representatives of both management and staff take part, the technical requirements will still be met even if one side prefers not to; so that actual participation by both sides is not a requirement. Nor was there any breach of Regulation 8.1. An analogy may be drawn with the issue that the Tribunal ruled on in Judgment 1565 (*in re* Kashmiri Lal Malhotra No. 6) under 8.

The concurrent surveys

18. The Organization says that concurrent surveys were not imposed for General Service staff and national officers. At no time did it intend to have joint preparatory work or analysis of data for those surveys, which were done separately for the two categories by separate salary survey committees: one for national officers and the other for the General Service staff. Joint work was to be limited to interviews: i.e. instead of having two separate sets of interviews the survey team would on the same occasion put questions both about national officers and about General Service staff.

19. The Tribunal is satisfied that there is no provision of the methodology or of the manual that precludes the approach that the Organization took.

The application of the methodology

20. The complainants argue that the methodology was improperly followed in that the choice of local employers was flawed: the working party of the LSSC drew up the list of twenty and the Committee - at the time including the staff representatives - approved it. The twenty came from several sectors and were all interviewed. On the strength of the data obtained from the interviews the seven best employers were identified, and as many as three of the seven belonged to the financial sector. The Organization explains that that sector was one of the first to be "liberalized" and so was free to compete on the local market by offering higher wages.

21. It was quite in keeping with the CCAQ's manual for the survey to take the comparator employers from several sectors, provided that they were among the best employers and that no one sector was dominant. A document of the International Civil Service Commission (ICSC/37/R.18) reviews the general methodology for carrying out surveys at "non-headquarters" duty stations. It says in paragraph 121 that some employers may belong to the same economic sector provided that they account for fewer than half of the total number. And the remaining three came from three different sectors: petrochemicals, the manufacture of consumer goods, and pharmaceuticals. So no single sector was dominant, and there was a reasonably wide cross-section of sectors.

22. The complainants suggest that the choice of employers may have led to a mismatching of jobs and that the employers may have provided unreliable data because they have no system of grading. They do not, however, identify any particular case of such mismatching. The Organization replies that jobs were matched with due regard to the criteria set in the manual, including the functions performed and the level of supervision required. Only if the local job matched the "benchmark" job description in duties and responsibilities was it taken for the purpose of comparison. The Organization says, moreover, that all the employers confirmed that they had a grading system and did not reckon pay ad hoc. There is no evidence to suggest that the data provided were in any way unreliable.

23. The conclusion is that there was no breach of methodology or manual in carrying out the survey.

The salary scales

24. The complainants doubt that the revised scales reflect the best terms of employment in the locality. They allege such "glaring anomalies" as having 19 steps in a single grade, "faulty ... grade overlap" and "reduction in annual increment".

25. The complainants offer not a shred of evidence to support their view that the scales were not a reflection of the best terms of employment in the locality. Their plea fails.

26. They object to the new scales on the grounds that they give 19 steps in each grade whereas the rules require that each grade should have at most 9 to 12. The Organization's answer is that for reasons that are linked to circumstances prevailing in New Delhi all the grades in question have since 1988 had 18 steps; that is not the outcome of the 1995 survey; and the differentials need not be the same at all levels and may vary as local practice changes.

27. The complainants' plea cannot succeed. The methodology says in paragraph 59 that the number of within-grade steps may be higher or lower in any particular locality, and there is therefore nothing wrong with the number of steps allotted to grades under the new scales.

28. As for what the complainants say about the overlap between grades, the WHO contends that the fact that it occurs at step VII of the higher grade is no "glaring anomaly": the overlap where grades have 12 steps would come at step III or IV of the higher grade, but when there are grades with as many as 19 steps the overlap is bound to occur at a higher step. The Organization points out that there has been the same structure of grades since 1988 and that it is quite consistent with the methodology. As to the decrease in the annual increment it submits that a reduction of a mere dozen Indian rupees – not even half a United States dollar – is no breach of the manual: adjustments may be made anyway if conditions in the locality warrant them, and there is no acquired right to the payment of increments at any particular level.

29. The complainants offer no argument in rebuttal of the Organization's reply on those issues. That being so, the conclusion is that they have not succeeded in proving any of the "glaring anomalies" they have alleged.

30. Mr. Battra, Mr. Sethi and Mr. Sinha state in their original brief that they do not understand how increases at higher levels came to be

"capped" at about 55 per cent. The Organization denies putting any "cap" on the level of such increases, the 55 per cent increase for some grades being warranted by the relevant findings of the survey. The Tribunal is satisfied with that explanation, which those three complainants have failed to rebut.

31. The same three complainants further attempt to question the lawfulness of the new scales on the grounds that the WHO, the "responsible agency", constantly rejected recommendations from the LSSC for applying "staggered increases" in making interim adjustments to pay in 1990-95; instead – they say – the Organization decided to apply "across-the-board increases". To their mind that made "a mockery" of both methodology and manual. To support their plea they apply to the Tribunal for the issuance of "letters rogatory" under Article 11(2) of its Rules to obtain what they call -

> "raw market data, weighted averages per grade and their treatment when constructing the new scales together with copies of the reports of the LSSC for the interim adjustments from 1990 to 1995 with details of weighted averages per grade obtained and the reports of the Responsible Agency rejecting the recommendations."

32. The Organization points out that interim adjustments are not at issue and that the manner of applying them is irrelevant to revision of salary scales in line with the findings of a comprehensive salary survey.

33. The defendant is right because interim adjustments are not of any relevance to the present complaints. The complainants' application is disallowed.

Conclusion

34. Since none of the complainants' pleas is upheld, the impugned decisions must stand and they are not entitled to the relief they seek. Nor are the intervenors.

DECISION

For the above reasons,

The complaints and the applications to intervene in Mr. Gaur's complaint are dismissed.

In witness of this judgment, adopted on 6 November 1998, Mr. Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

ABGardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-SIXTH SESSION

***In re* Desbiolles (No. 2),**
Dourliach, Hamel, Hernández,
Le Dantec and Seiler

Judgment 1840

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr. Joël Desbiolles - his second - by Mr. Hervé Dourliach, Mr. Alain Hamel, Mr. Rufino Hernández, Mr. Georges Le Dantec and Mr. Gérald Seiler against the International Telecommunication Union (ITU) on 13 September 1996 and corrected on 8 September 1997, the comments by the International Civil Service Commission (ICSC) of 22 January 1998, the single reply filed by the ITU on 26 February 1998, the complainants' comments thereon of 29 March and their rejoinder, the Commission's further brief of 17 July on the comments and on the Union's reply, the Union's letter of 30 September telling the Registrar that it did not wish to enter a surrejoinder, the complainants' further brief of 24 September and the Commission's final comments thereon of 4 November 1998;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 6(1)(b), 9 and 13(3) of its Rules;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. What is known as the "Flemming" principle governs the pay of staff in the General Service category in organisations that belong to the common system of the United Nations. It calls for alignment with the best terms of employment at each duty station. Every five years the International Civil Service Commission carries out surveys to find out what the best terms are at headquarters duty stations. It has what it calls a "general methodology" for such surveys. As was explained in Judgments 1519 (*in re* Prados and others), 1641 (*in re* Berlioz No. 2 and others) and 1713 (*in re* Carretta and others) in A, the Commission revised its methodology in 1992.

In June to August 1995 it carried out a salary survey in Geneva according to the new methodology, the findings to afford the basis for new scales of pay for General Service category staff stationed there. At its 42nd Session (24 July-14 August 1995) it commended the new scales to the organisations with headquarters in Geneva. The upshot was that for General Service staff in Geneva the old scales would not be adjusted at 1 January 1995. The World Intellectual Property Organisation (WIPO) so decided, and in Judgment 1641 of 10 July 1997 the Tribunal ruled on complaints that challenged that decision.

By service order 16 of 28 September 1995 the Secretary-General of the ITU issued new scales of pay for General Service staff as from 1 October 1995. Those scales set pay on the average 7.4 per cent lower than in September 1995, but the order explained that they would apply only to staff recruited on or after 1 October; besides giving, as before, gross and net rates of pay it set out scales of gross pensionable remuneration.

The complainants are members of the General Service category of the Union's staff and are employed at its headquarters in Geneva. By memoranda of 8 November 1995 they asked the Secretary-General of the Union to reverse service order 16 and grant each of them due redress. In memoranda of 20 December 1995 the Secretary-General refused on the grounds that he had to abide by the instructions he had had from the Council of the Union to bring in the new scales; but he gave them leave to go straight to the Tribunal. Not but what they went first, on 18 March 1996, to the Appeal Board. In its report of 30 May the Board held that the Secretary-General had acted *intra vires* and it "could not" recommend reversing his decisions of 20 December 1995. By memoranda of 17 June 1996 – the decisions under challenge – the Secretary-General told the complainants that he was upholding those decisions.

B. The complainants contend that the amendments that the Commission made to the methodology in 1992 were unlawful. Of some fifty amendments they see only one as in the staff's favour and nine as blatantly not. Surveys that the Commission has done by the amended methodology have meant a drop in staff pay at all headquarters duty stations but New York. In Geneva it came to 7.4 per cent. By rigging its methodology for that purpose the Commission offended against both Flemming and Regulation 4.1 of the ITU Staff Regulations, which sets the criteria for recruitment. The complainants put the amendments down to the eagerness of some of the Commission's members to pander to a coterie of powerful nations by cutting costs to the staff's detriment, and at a time, to boot, when the Union's budget was not even tight. Taken all together, the amendments undermine the whole purpose of the methodology.

The complainants' second plea is that arrangements for the 1995 survey were deeply flawed, and so was the conduct of it. It was sheer misuse of authority for the Commission to exploit the new "six-month rule" by making June 1995 the reference date for the survey and to refuse adjournment when it knew full well that the survey could not be properly done so soon. Flawed, too, were the proceedings at its 41st Session, which it held from 1 to 19 May 1995. For one thing, it missed the deadline in Rule 8 of its Rules of Procedure for letting members and observers have "documentation" relating to the survey. For another, that documentation had "serious shortcomings" that its secretariat never made a clean breast of. Again, under Rule 18 of the Rules of Procedure a French version ought to have gone out before the session, but none did. The Commission's Chairman showed bad faith: by a letter of 14 November 1994 he told the Under Secretary-General of the United Nations for Administration and Management that the matter of adjournment would be put to the Commission at its 41st Session; yet the last section of the preparatory document for the session said nothing of the kind. There were formal and procedural flaws in the contacts between the secretariat and the comparator employers.

As for the flaws in the conduct of the survey in Geneva, paragraph 15 of the methodology puts the "reasonable number" of comparator employers at "approximately twenty". Only 16 were sent questionnaires and of those two or four failed to meet the criteria. Paragraph 22 states that "the typical number of jobs to be surveyed should be between 14 and 20" and paragraph 40 that, when there are "approximately 20 employers", "at least one quarter of the surveyed employers should provide data for a particular job in order to retain it for the analysis". Had that criterion been met, 10 of the 22 jobs picked would have been dropped; but the Commission preferred to keep them so as to have the minimum required. The complainants go in detail into the sample jobs. They find much wrong with the data. They point out that the Local Salary Survey Committee said in a report dated 2 August 1995 that despite insistent demands the ICSC's secretariat had failed to let it know just how AIRINC (Associates for International Research), a firm of consultants, had worked out the tax deductions relevant for Geneva. That is why the Committee felt unable to check the figures. Yet the secretariat was not shy of firm figures in its main report on the survey: allowable deductions from Swiss federal tax for professional expenses came, it said, to 700 Swiss francs. The right figure is 3 per cent of net earnings, within a range from 1,700 francs to 3,400.

There were breaches of the rules at the Commission's 42nd Session, too, many of them the same as at its 41st.

The complainants' third line of argument is that the findings of the survey were obviously wrong. According to the Swiss federal bureau of statistics average pay in Switzerland went up in real terms by an average of 0.4 per cent a year from 1990 to 1994. Though that figure does not allow of direct comparison with the findings of the survey, the Commission's own reckoning gave a fall of 7.4 per cent. The gap between the two figures is big enough to suggest that the findings about outside pay in Geneva shot wide of the mark. Bent as it was on bringing down General Service pay in Geneva, the Commission was guilty of preconceived opinion and misuse of authority.

Fourthly, the complainants plead that the new pay scales were put into force before the Secretary-General of the United Nations had even been told of them and that, in breach of the procedure laid down in Article 25 of the Commission's Statute, neither the Secretary-General nor, for that matter, the staff representatives were told of them either. In subsidiary argument they contend that the scale of gross pensionable remuneration shows a mistake of law as to the "conversion rate" and one of fact as to the tax rates applied.

They ask the Tribunal to quash the decisions in their pay slips for October 1995 and award them the arrears of pay due and interest thereon at the rate of 8 per cent a year. They claim 3,000 Swiss francs each in costs.

C. The Commission submits that its revision of the methodology in 1992 was quite lawful. Since some of the amendments were more sweeping than others, it will not do for the complainants just to tot up the ones they see as unfavourable against the others. The objections they have to some of them are misconceived. The purpose was not at all to cut pay but to keep more faithfully to Flemming.

As to the arrangements for the survey in Geneva in 1995, the core of the work was the gathering of data. It was, according to the schedule put through at the 36th Session, to be done in the second quarter of 1995. Though it had to be held over until June 1995, that was because the staff representatives had baulked at what the revised methodology required of them. There was nothing wrong with what the Commission did at its 41st Session: it may waive provisions of its own rules of procedure for the sake of its members' convenience. Nor were there any formal or procedural flaws in the contacts between its secretariat and the chosen employers.

The only snag the Commission ran into over carrying out the survey was finding enough outside employers to meet the criteria. What made things harder was that the staff representatives were trying to get the employers to withhold the data needed. The Commission rebuts the complainants' other pleas and answers point by point their objections to the sample of jobs and the soundness of the data. It is ordinarily up to the Local Salary Survey Committee to find out about tax rates and allowable deductions for Geneva and, if it cannot, it is up to the Commission to get the information from AIRINC instead. The secretariat asked the Committee time and again to say whether its figures were right.

The Commission denies breaking any rule of procedure at its 42nd Session.

It had come to no foregone conclusions about the outcome of the survey. Its people put in quite enough time in Geneva in 1995 and went to trouble to get the work done well.

By a letter of 18 August 1995 its Chairman told the Secretary-General of the United Nations of the new scales, and copies of the letter went on 15 September to the executive heads of the specialised agencies with headquarters in Geneva.

There was no mistake of law about the "conversion rate" in the scales of gross pensionable remuneration.

D. In its reply the Union says that a resolution of its Council, No. 647, strictly defines its Secretary-General's powers to bring in new pay scales. It requires him to make any changes in pay that have been adopted for the common system and that apply to Geneva.

On the merits the defendant submits that it cannot itself answer the complainants' pleas and that it is for the Commission to comment on their objections to the lawfulness of the scales and to the soundness of the findings.

So it asks the Tribunal to dismiss the complaints on the grounds that the Secretary-General acted *intra vires* and to entertain the Commission's pleas in ruling on the lawfulness of the scales.

E. The complainants rejoin that the Secretary-General erred in law in doing no more than what resolution 647 demanded of him. When an organisation takes on rules or policies from the common system it must check that they are lawful. The complainants challenge the Commission's explanations and enlarge on their own pleas. They observe that the Commission does not deny its mistake over the tax figures and accuse it of shifting blame to the Local Committee. They press their claims.

F. In a further brief the Commission maintains that the complainants have found not a single new argument to back up their case. It did "let through a mistake in the tax figures" and the deductions from tax for professional expenses should have been 1,700 Swiss francs and not 700. But even if those mistakes had been put right average net pay in Geneva would have gone up by a mere 0.08 per cent a month, or five Swiss francs.

G. In further comments admitted by the President of the Tribunal the complainants submit that the Commission's avowal comes late in the day.

It is still wrong to give only the figure of 1,700 Swiss francs: the right one is – they repeat – 3 per cent of net earnings, and not less than 1,700 Swiss francs or more than 3,400. The mistake means a loss in pay of some 12.50 francs a month. It affects, too, the reckoning of allowances for a spouse or dependent child and of pensionable remuneration. And it was not the only mistake.

H. In final comment the Commission maintains that the mistake made no immediate impact on the complainants' earnings. The survey gave warrant that the old scales of pay for staff in the General Service category at the time of the survey were 7.42 per cent too high. If the Commission had taken 1,700 Swiss francs as the minimum figure of allowable tax deductions the new scales would have been 7.34 per cent lower than the old ones, and even if, as the complainants suggest, it had taken the figure of 3 per cent of net income, a minimum of 1,700 francs and a maximum of 3,400, the new scales would still have been 7.28 per cent lower. So on any hypothesis there was no avoiding a fall in pay. When a survey shows pay to be too high the common system is wont, not to lower it, but to freeze it. So the defendant refrained from applying the new scales to staff like the complainants whom it had taken on before the scales went into force. Only for staff recruited after the new scales came in did the mistake have any effect on pay, and it was trifling at that.

CONSIDERATIONS

1. The complainants belong to the General Service category of staff of the International Telecommunication Union (ITU), which belongs to the common system of the United Nations. They are employed at headquarters in Geneva. They are challenging the Union's decisions on their pay as from the month of October 1995. The Union approved the pay scales on the recommendation of the International Civil Service Commission (ICSC). In keeping with what is known as the "Flemming" principle the Commission drew up the scales in the light of trends in the pay of the best-paid workers at the duty station. In accordance with a revised general methodology which it had adopted in 1992 it had had a survey of pay carried out in Geneva from June to August 1995, 1 June of that year being the "reference date".

The complainants' case is that the scales recommended by the Commission were unlawful and the Union should not have adopted them. In their view some of the amendments which the Commission had made in its methodology – and which are taken up in detail in 5 to 17 below – were in breach of the Flemming principle. They say that those amendments brought about a drop in pay that offended against what the Tribunal had said in Judgment 986 (*in re* Ayoub No. 2 and others): there was breach of their acquired rights, of their contracts of service, of good faith and of their rightful expectations about the level of pay. They see a further breach of their rights in the carrying out of the survey in that it broke rules of form and substance. On the strength of comparison of pay between Geneva and New York the scales betray preconceived thinking and abuse of authority. Lastly, the complainants put two more pleas to the Tribunal: one is that the scales were not conveyed in final form to the Secretary-General of the United Nations before coming into force; and the other is that in drawing up the scales of gross pensionable remuneration the Commission made a mistake of law by taking 66.25 per cent as the "rate of accumulation" and one of fact over the relevant rate of taxation.

The Commission rebuts all the pleas put forward by the complainants.

2. Many judgments have explained how the common system revises pay and what power of review the Tribunal has. Examples are Judgments 1000 (*in re* Clements and others), 1265 (*in re* Berlioz and others), 1266 (*in re* Cussac and others), 1457 (*in re* Di Palma and others), 1458 (*in re* Damond and others), 1459 (*in re* Hoebreck and others), 1460 (*in re* Derqué and others), 1498 (*in re* Schiffmann and others), 1499 (*in re* Berger and others), 1519 (*in re* Prados and others), 1641 (*in re* Berlioz No. 2 and others), 1642 (*in re* Huber and Treso), 1713 (*in re* Carretta and others), 1765 (*in re* Dondenne No. 2 and others), 1766 (*in re* Heitz No. 4), 1776 (*in re* Damond No. 3 and others), 1777 (*in re* Heitz No. 5), not to mention all the other precedents cited therein.

A staff member who challenges an individual decision that affects him may challenge the general one that it implements, even if the source of the general one was not the employer organisation itself but an outside body such as the Commission. So before acting on any decision or recommendation of the Commission's the organisation must be satisfied that it is lawful.

The choice of method for following a principle like Flemming is largely a technical issue and a matter of discretion. The Tribunal will therefore exercise only a limited power of review.

3. According to precedent it is the implementing decisions that may be challenged and here they are the ones that set the complainants' pay from October 1995. The general decision to approve the pay scales is not directly challengeable, though the complainants may indirectly challenge it insofar as it affords the basis for the impugned decisions.

4. To be receivable a complaint must disclose some cause of action.

In its final comments the Commission pleads that the complainants fail to show any cause of action: the new scales based on the findings of the survey caused them no loss of pay. That, it points out, is because they had the earlier figures of their pay "frozen". It explains:

> "When someone on a 'frozen' scale gets a step, ordinarily once a year, or else promotion, pay is on that scale, not on the ones based on the survey, and stays on it until the new ones overtake it by dint of adjustment to the cost-of-living index. When they do, it is they that set pay. But they have not done so yet and are unlikely to before the next survey for Geneva, scheduled for 2001."

The Commission is mistaken. The complainants do have a cause of action and may now challenge the new scales because on them will depend the duration of the "freeze" in their pay and the reckoning of any rise they may become entitled to. Pay scales must ordinarily be challenged forthwith. As the Tribunal has said before, if administrative decisions are to hold good and relations between organisation and staff to be stable, no appeal may lie against them at the time of later revision: see, for example, Judgments 1664 (*in re* Cook No. 7 and Rosé No. 2), 1682 (*in re* Argos and others), 1780 (*in re* Kunstein-Hackbarth) and the other precedents there given. If someone on a frozen pay scale might wait to challenge the new scales, that would make for great uncertainty.

The amendments made in 1992 to the methodology

5. The Commission submits that Judgments 1641 and 1642 rejected by implication the complainants' objections to the revision of its methodology.

They did not: they said under 4 that the amendments had not been challenged in the complaints. Besides, they were about another issue altogether – the setting of pay as from January 1995 – and so do not carry the authority of *res judicata*.

6. The Commission first revised its methodology in 1988. Its report for 1992 to the General Assembly of the United Nations gave an account of the second revision, done in that year. In resolution 47/216 of 23 December 1992 the Assembly took note of that second batch of amendments. In 1994 it asked the Commission to go ahead with the surveys under way at headquarters duty stations and to follow the revised methodology for the purpose. Actually some of the fifty-odd amendments were not innovations.

The complainants contend that, though some of the amendments – known in the Commission's parlance as "decisions" – had no effect on pay, one of them that did favour the staff was not applied at all to the Geneva survey in 1995 and nine were downright unfavourable. The complainants take up ten of the "decisions": in their submission all are challengeable because they betray Flemming and, taken together, serve to lower pay.

7. Decision (v) by the Commission was –

> "To amend the condition in the current methodology as regards the inclusion of public service or parastatal institutions in the sample of employers, as follows:
>
> 'Surveyed employers should represent a reasonable cross-section of competitive economic sectors, as well as the public service or parastatal institutions with no sector unduly dominating the sample.'"

The 1988 version of the methodology had said on that subject:

> "The employers should represent a reasonable cross-section of competitive economic sectors, including the public service or parastatal institutions, with no one sector unduly dominating the sample."

The complainants object to decision (v) on the grounds that it is to the staff's detriment to require "the inclusion ... of public service institutions, which are not ordinarily among the best-paying employers at any duty station".

The Commission says that there is nothing new about including the public service. The 1988 methodology did, and for years pay in the public service has been seen as a worthwhile standard of comparison. Including it is – says the Commission – quite in tune with Flemming and, according to paragraph 41 of its report on the 1992 methodology, discarding an employer is merely provisional anyway because the Commission itself has the last word in each instance.

As was said in 2 above, a staff member may challenge a general decision in impugning an individual one but must show that the general decision afforded the basis for it. Here the complainants do not allege, let alone show, that the above amendment to the methodology harmed their interests or, to be more particular, that the previous survey discounted pay in the public service or, for that matter, that the pay of public servants in Geneva falls below the best rates to be found there. So it is immaterial whether the complainants are objecting only to the amendment or to counting public servants' pay, even if it already counted before the amendment.

Besides – subject to what statistics might reveal – the Tribunal sees no breach of Flemming in counting it: the national public service is much like the international civil service as to the sort of work done, the structure and size of units, and the manner of payment. On the evidence the Commission was guilty of no abuse of discretion on that score.

8. Decision (vi) says:

> "That the minimum number of clerical and support employees per employer should be set at 100. Where transitional measures are required to maintain reasonable continuity of employers between surveys, the requirement concerning the revised minimum number of employees would be applicable only to employers not previously surveyed; in any case, employers with less than 50 employees would be excluded."

In the complainants' submission the purpose was to harm the staff's interests. In Geneva – they argue – where the employment market is small, there were keenly competitive employers with twenty or thirty employees, and the Geneva survey broke the rule so as to make the findings "look convincing".

The Commission explains that its purpose in raising the minimum number of employees was to bring it nearer to that of international staff at headquarters duty stations. It quotes from paragraph 14 of its report on the 1992 methodology:

> "Where transitional measures are required to maintain reasonable continuity of employers between surveys, the requirement concerning the revised minimum number of employees would be applicable only to employers not previously surveyed."

Comparison of the surveys done in Geneva in 1990 and 1995 shows that the increase had little or no effect.

The complainants acknowledge as much in their rejoinder. So the impugned decisions are not flawed on that score.

9. Decision (xxvi) was -

> "To delete the current rule in the methodology, whereby an employer would be excluded if the base salary plus other elements of remuneration for the lowest-ranking employer resulted in average salaries 10 per cent or more below the next higher average salary for each job."

In the complainants' view it was in breach of Flemming and the staff's rights to do away with the possibility of striking out an employer who was obviously not one of the best.

The Commission points out that according to the 1988 methodology an employer might be dropped if for all jobs pay was at least one tenth lower than the figures on offer from the other employers. Actually few employers ever were dropped: an employer might be offering the worst pay for some jobs but not commonly for all. So the survey switched to taking minimum and maximum figures from a schedule of pay rates for different sorts of job.

The complainants discern in the Commission's new approach a wish to harm their interests, the findings being unreliable if not all the highest figures of pay are taken. Besides, as Judgment 1713 made clear about a survey in Rome, the Commission is not actually taking the minimum and maximum figures that its new method is supposed to call for.

That judgment explained in 8 that the complainants in that case were objecting to the methodology on the grounds that the Commission had taken average figures of pay of categories of employees in Rome instead of the minimum and maximum ones it had been taking until then. The old approach would give a more objective yardstick because in Rome few employers had, like the United Nations, any system of grading posts. The Commission had demurred on the grounds that average figures did give a reliable picture. The Tribunal's ruling was that the Commission's purpose had not been to harm the staff's interests and that there was nothing blatantly wrong with the exercise of its discretion.

That ruling holds good here. The complainants have not shown that the survey was done in Geneva in the same way as in Rome. Besides, if the challenged method was not applied in Geneva there is no substance to the plea. In any event the conclusion is, again, that there was no obvious abuse of the Commission's discretion in the change.

10. The gist of decision (xxxiii), which is about "evaluating" fringe benefits, is that what counts is the cost to the employer, not the value to the employee.

That amendment aroused opposition when applied to a survey in Paris. Judgment 1519 said in 6 that, as the complainants had argued in that case, it did mean "a reduction of outside employees' fringe benefits"; but the change was "not as bad as they make out since some such benefits were already being evaluated in terms of cost to the employer"; "the effect of the change was slight"; and there was "nothing inherently wrong" with the Commission's exercising its discretion to count the cost of all fringe benefits to employers.

The complainants cite that judgment in support of their view that, being to their detriment, the amendment was unlawful.

The Tribunal sees no reason to depart from what it said before.

11. Decision (xl) does away with the "language factor". That was an adjustment that took account of language skills and used to be granted in Rome and in Vienna, where the working languages of the organisations do not include the one commonly spoken by local people.

Since the amendment had no effect on the findings about pay in Geneva, the complainants are mistaken in relying on Judgment 1713.

12. Decision (xlii) is to the effect –

> "That, in view of the use of the job classification system and dual pay-line methodology, no adjustments in respect of internal/external differences in length of service/seniority should be made to internal salary levels."

The upshot is that for the sake of comparison with outside pay there is no longer any need to make corrections to take account of differences in employees' seniority, which become irrelevant.

The complainants again object on the grounds that the amendment is to their detriment. They say that in organisations which have a freeze on recruitment seniority is tending to rise whereas among outside employers it is not. The consequence is, they explain, that United Nations staff are earning more than outside employees in like jobs and their pay looks misleadingly high. To stop making adjustments on that account is unfair, though it would not be if international organisations took on many young people. In the complainants' submission Judgment 1519 condemned the change.

The Commission's answer is that, though seniority was one of the main criteria for granting step increments to General Service staff, most of the comparator employers made performance, and not seniority, the test.

Judgment 1519 took up under 17 a similar plea about the survey in Paris. It said that, though there was merit in the criticism – comparison of jobs at like levels of seniority being preferable – the comparison was fated to go awry, to whichever side one might tend on the point. The conclusion was that the approach that the survey had taken was not unlawful and had not gone beyond the bounds of the Commission's discretion.

That ruling holds good.

13. Decision (xliii) is –

> "To include salary data for staff in receipt of the extra longevity step approved by the Commission in 1984, at the next lower step."

The complainants object on the grounds that the amendment "makes for even more tendentious findings".

The Commission submits that it is a more workmanlike approach to take figures of pay of staff in the common system without regard to the "extra" step: though of course everyone counts for the sake of comparison, those who get the extra step will be deemed to be at the one just below.

The complainants' retort is that the approach would be "workmanlike" only if the survey took for the sake of comparison outside employees in like case. It does not.

Here the complainants are objecting not to the methodology as such but to the way in which it was applied. There can be no breach of Flemming in any method that is supposed to show things up as they really are, and, besides, what was said in 12 above again holds good. The plea fails.

14. Decision (xliv) reads:

> "To include salary data for staff at steps beyond those approved by the Commission, at their actual step."

The complainants contend that it flouts what Judgments 1265 and 1266 said under 36. To their mind it is unfair to count benefits improperly granted to staff in some organisations and so inflate the pay of staff in organisations like the World Intellectual Property Organization that do abide by the rules of the common system.

The Commission points out that those two judgments came after the 1990 survey in Geneva and that "in the Geneva survey in 1995 staff whose step was beyond the one approved by the Commission were put at steps set in keeping with Judgments 1265 and 1266".

In their rejoinder the complainants maintain that decision (xliv) ignored what the Tribunal had said; the method was not, they say, corrected even in the revision of July 1997, and adapting the methodology is no way of complying with Judgments 1265 and 1266.

Those judgments acknowledged in 36 that, if one organisation of the common system granted staff within-grade steps beyond those approved by the Commission for the purpose of Flemming, the extra ones should not count in setting pay in the international civil service at large. So the judgments set aside the impugned decisions and ordered the defendant to set pay by a reckoning that discounted the extra steps for the sake of comparison.

At issue here is whether the Commission observed precedent in carrying out the survey in Geneva in 1995. Judgments 1265 and 1266 went out on 14 July 1993; so, as the Commission observes, the methodology which the complainants are indirectly challenging - and which goes back to 1992 - is earlier and decision (xliv) cannot be seen as wilful defiance of precedent. Besides, the complainants have not objected to the Commission's statement that the conduct of the survey was in line with Judgments 1265 and 1266 and there is therefore no reason to question it. The complainants argue that the Commission ought to have gone back on decision (xliv) in 1997, when it again revised the methodology; but their point is immaterial if the decision was not actually applied in this case. Since it was not, it caused them no injury and their plea does not hold water.

15. By decision (xlvii) the Commission resolved -

> "To establish a uniform factor of 0.9 by which the index movement should be governed for purposes of periodic adjustments between surveys ..."

The complainants object to that decision; the Commission explains it. But it too is immaterial: the decisions impugned were the outcome of a survey and "adjustments between surveys" are simply not at issue. The plea again fails.

16. The last of the Commission's "decisions" that the complainants challenge is (xlviii): it does away with "interim adjustments" of pay in the six months "prior to the reference date of a survey", and they see it as detrimental.

Judgments 1641 and 1642 held that that decision was not at odds with Flemming and the complainants therefore waive the plea. Again, there is no reason to depart from what those judgments said.

17. The complainants point out that the surveys done according to the 1992 methodology brought about a big fall in pay. The fall was 7.4 per cent for Geneva, 7.3 for Montreal, 5.4 for Paris, 5.3 for London, 3.2 for Vienna and 2.6 for Rome, as against a rise of 1.13 per cent for New York. The complainants see such falls as a departure from Flemming. The gist of the argument is that they were largely due to the Commission's tampering with the methodology so as to bring down pay in the international civil service against the trend of local pay.

That line of argument is implausible, to say the least. Wages may of course strengthen, but when the economy goes into a downswing they may slacken too. At all events the complainants have failed to show that staff pay fell for the reasons they make out. Although some of the amendments to the methodology may be moot, there are no grounds for treating them as the main cause of the falls in General Service pay or attributing them to wilful contrivance.

There is therefore no substance to the plea that the complainants rest on Judgment 986 (*in re* Ayoub No. 2 and others).

The 1995 survey

18. The complainants say that Commission and Union alike were guilty of misuse and abuse of authority by making 1 June 1995 the reference date for the survey. It would, they argue, have been right to hold over the survey

so as to let General Service staff gain earlier from the so-called "six-month rule" and so also from the findings.

That rule took effect before the new scales came in; the complainants are challenging their pay for October 1995; and the rule is therefore not directly relevant. Besides, Judgments 1641 and 1642 declared that it had not been unlawful six months before 1 June 1995 to make that the reference date for the survey.

Once the date had been set it would doubtless have been hard to hold it over for the purpose of applying the six-month rule. It was also in line with Flemming not to take too long over the survey.

The complainants see misuse and abuse of authority in the Commission's turning down the staff representatives' request for adjournment of the survey and of the entry into force of the new scales: it just did not have time for a proper survey. In support of that plea they cite some of their arguments about the complaints that Judgments 1641 and 1642 ruled on.

In rebuttal the Commission points out that the General Assembly wanted the survey done soon; the staff representatives would not take part, although the rules said they should, and put a spoke in the wheel by trying to get employers not to answer; and it ill befits the complainants to carp at the consequences of the representatives' stance.

Articles 6(1)(b) and 9 of the Tribunal's Rules require the complainants to state their pleas in their original brief and rejoinder. They may not just cite arguments about some other case: such pleading is not admissible and the Tribunal will not entertain it.

Judgment 1519 said in 18 that it was important to have staff representatives take part in general surveys. If they will not do so they may disrupt the work and the proper exchange of information. Here again they chose not to help.

The detailed evidence the Commission adduces on the merits is cogent. The Union - and only the Union's decisions are at issue - did not act unlawfully in declining on the grounds that the complainants suggest to turn down the Commission's recommendations.

19. The complainants see flaws in the proceedings of the Commission's 41st Session, which it held in Montreal from 1 to 19 May 1995.

(a) They plead breach of Rule 8 of its Rules of Procedure, which says that papers must go to members and observers no later than four weeks before the start of a regular session. They plead breach of Rule 18 too, which says that all papers about agenda items must go out in the working languages, English and French. They point out that the preparatory papers were dated 12 and 13 April 1995 and an appendix to document ICSC/41/R.12/Part I, which was a letter from the presidents of the Geneva staff unions and associations to the executive heads of the organisations in Geneva, was only in French, so that members who read only English could not fathom it.

The Commission says that, though indeed not strictly complied with, the two rules are for its members' own convenience, the members waived the time limit and the need for translation, no-one minded and the waiver was valid. Since the rules did not go to the essence of the procedure – the argument runs – it was up to anyone who alleged breach of them to demand compliance; the representatives of the staff of organisations in Geneva did not, and so there was no procedural flaw.

The Commission's reply is in line with general rules of procedure and is quite sound.

(b) Under the heading "Concealment" the complainants argue that the Chairman of the Commission did not let its members have enough information. On 30 September 1994 the organisations asked how the survey could go ahead without the recalcitrant staff representatives. Though the Chairman answered on 14 November 1994, the paper intended for the Commission was not ready until 12 April 1995, nineteen days before the start of its session. According to the complainants, a letter of 10 April from the secretariat said that it had not yet gone into the proposals for the survey, whereas the paper dated 13 April showed that it had. The complainants argue that that paper hid the fact that the Chairman needed more information before he exercised the authority delegated to him to approve the choice of employers, jobs, job descriptions and questionnaires. So the Commission did not work properly and the Chairman withheld information that its members needed to make up their minds.

The Commission protests that the charges are offensive to its Chairman.

Though the staff representatives' abstention did hamper the preparations for the survey and the conduct of it, that is no reason to doubt its lawfulness or impute improper behaviour to the Commission's secretariat or membership. And though things went swiftly, it is not shown that the Chairman or the secretariat failed to give the members enough information.

(c) The complainants further tax the Chairman with bad faith on the grounds that in a letter he promised to put the matter of adjournment to the Commission whereas in a later document that proposed action of various sorts to the Commission itself he said nothing on the subject.

No such inconsistency is proved. For one thing, the Chairman's saying that the proposal for adjournment would go to the Commission did not mean that he would back it or put it to the members in writing. For another thing, the document did not preclude his taking the matter up at the 41st Session.

(d) The complainants object to the Commission's going ahead on the grounds that the decision was hasty, stubborn and unwise.

But there was no denying the need for the survey and on the evidence the decision to go ahead was not improper. The plea fails.

20. The complainants blame the Commission for a mistake of procedure in the contacts it had with the chosen employers. They say that as early as 10 April 1995, even before the start of its 41st Session, its secretariat wrote to the international organisations in Geneva to tell them to make appointments with the employers in the period from 1 to 23 June 1995.

The Commission answers that its secretariat did so by way of precaution to gain time. Had there been no survey after all, it would of course have cancelled the appointments.

The explanation is plausible, indeed beyond reproach: there was no mistake of procedure.

21. The complainants contend that the survey itself showed many flaws, one being the choice of employers.

(a) They point out that the methodology puts the "reasonable number" of employers at "approximately twenty", whereas only sixteen were picked for the survey.

They are mistaken. The words "approximately twenty" and "reasonable number" show that the methodology gives no firm figure but just a rough idea; so the decision to take sixteen passes muster.

At all events - say the complainants - the number of employers should have been twelve to fourteen, because with some the interviews were improper for the reasons set out in (b), (c) and (d) below.

(b) One interview was by telephone: that shows how casual the survey was and, in accordance with Judgment 1000, warrants "setting aside" the findings.

The Commission explains that an interview by telephone, though quite unusual, is allowable when the employer has been consulted in an earlier survey and the Commission already has reliable information from it on the matching of jobs and on levels of pay. Members of the survey team may draw on information obtained by telephone if they so wish.

Judgment 1000 says nothing on that score, and what the Commission says rules out abuse of discretion.

(c) The complainants point out that two of the employers had no system of grading posts, though the methodology says that that is desirable.

The Commission explains that, especially in Europe, not every employer has a system of grading like the one used in the common system. The criteria are that the setting of pay should not be haphazard and that distinctions in category and pay should depend on responsibility and on the work done; and it is up to the survey team to say whether an employer meets those criteria.

The Commission did not thereby abuse its discretion.

(d) The complainants observe that one employer had only 23 employees whereas the methodology requires at least 50.

The Commission explains that that employer had already been "used" in earlier surveys; there had to be some continuity in the choice of employers; and representatives of staff and management had often asked the Commission not to apply the rule too strictly but bear in mind the smallness of the employment market in Geneva. The Commission took its decision after careful thought.

In challenging decision (vi) the complainants have objected to the minimum of 50 employees on the grounds that it scarcely applies in Geneva: see 8 above. So it is odd that they should object to taking one employer that had fewer than 50. At all events it was in line with the methodology to take such transitional action. Again there was no abuse of the Commission's discretion.

(e) The complainants see "imbalance" in the choice of sectors of employment in the survey, there being a drop in the number of banks, which are among the best employers.

The Commission says that although there had been four banks in the last survey two of them had merged and so there were only three in 1995. Out of sixteen employers there were three banks, and that number is more than enough.

There again the complainants have failed to show any breach of discretion.

(f) The complainants accuse the Commission of perverting the methodology so as to get the survey to cover particular employers or jobs. The Commission answers that it does not follow the methodology too rigidly but fits it to local conditions and so, in Geneva, to the smallness of the employment market.

That approach complies with the methodology as revised in 1992, in particular with paragraphs 6 and 13, and with the broad, merely indicative guidelines that the methodology offers for carrying out surveys. So there was nothing unlawful about it.

22. The complainants object to the choice of jobs. Paragraph 22 of the methodology says that there must be a sample of fourteen to twenty jobs. Only by artifice did the Commission push the number up to fourteen: some of them did not fully qualify.

The Commission explains how it came to pick those jobs. Because some enterprises were small it was unreasonable to expect them to employ many people in the same sort of job. The Commission took care to see that jobs matched and it discarded any for which it felt that not enough employers were offering a true match.

Again there is no evidence to suggest any abuse of authority by the Commission.

23. The complainants object to the sample of jobs.

(a) One of the jobs the Commission took was senior secretary, and the final table shows 158 of them with fourteen employers. In the complainants' submission cantonal government was overwhelmingly preponderant in employing such secretaries, and presumably computer information assistants too: there were 44 such assistants with three employers and one with each of another four.

The Commission says that it wanted to keep the job of senior secretary because it was typical, even though some employers had only one. As for the alleged predominance of cantonal government, the methodology is not strict about the number of people there should be on the same sort of job with any one employer. In any event the impact of employers with a large staff is, it argues, levelled out by logarithmic weighting.

There is no evidence of any mistake or breach of discretion on that score.

(b) The number of accounting clerks fell inexplicably from 44 to 43 for the same number of employers.

The Commission acknowledges a mistake in the paper by its secretariat but points to the correction in its report.

Obviously the mistake does not matter.

(c) The jobs of transport assistant and senior cashier were - say the complainants - kept, even though there were no such jobs in outside employment in Geneva.

The Commission demurs: those jobs were dropped in the final findings for want of enough employers offering matches.

There being no reason to question that explanation, the plea fails.

(d) The complainants go with a fine-tooth comb through the data provided by one employer, a bank, on 8 August 1995, i.e. after the issuance of the preparatory paper of 2 August. They say that comparison of that paper with the final table shows that whereas the number of employers went up from seven to eight the number of messengers rose from 35 to 43; the bank had neither a junior nor a category I nor a category II secretary, but ten senior ones; it had five category I and as many category III accounting clerks but not a single senior finance assistant; it had five telephone operators, no security guard, five electronic-data-processing assistants, no computer information assistant and no senior cashier.

The Commission maintains that the data are reliable. Though for some jobs there are no matches, the jobs still exist: the duties simply fail to match the description. What with computers and redundancies everywhere more and more employers have been merging duties and responsibilities. Security in the bank is provided, not by its own employees, but by an outside firm.

Although the Commission's general comments call for no ruling, the Tribunal cannot go into detail and tell whether a proper match was found for each job taken. When in doubt on technical issues, however, it will endorse the Commission's assessment: here too the complainants have failed to show any abuse of discretion.

24. The complainants question the soundness of the data.

(a) They point out that the "benchmark" jobs in cantonal government were at lower levels than in the last survey and the corresponding figures of pay were thus brought 7 per cent lower. The Commission's secretariat estimated the effect at a reduction of 0.25 per cent in the total of outside pay.

The Commission says that because of the prominence of cantonal government matching jobs were chosen carefully and approved by two members of the survey team. It argues that, though the figures of pay for some of the matching jobs may have been lower in 1995 than in 1990, the reason is that the earlier survey discounted employees with under five years' seniority. In 1995 there was no new information about seniority, the criteria for matches being the work to be done, the required qualifications and the level of responsibility.

The complainants show no mistake of fact in the findings. The Tribunal took up in 12 above the plea about the amendment to the methodology and found decision (xlii) beyond reproach. And the manner of applying it is not faulty either.

(b) The complainants point out that for five employers the number of staff ends in a nought and infer that the Commission rounded the figures up or down. To their mind that is evidence of shoddy work and suggests that the findings are unreliable.

The Commission denies outright having tampered with the figures; it took the ones the employers gave, though some of them may of course have rounded staff numbers up or down.

No mistake is proved on that score.

(c) The complainants say that one employer offered a job with a single employee and for that reason the job ought to have been scrapped.

The Commission answers that, though the secretariat mentioned that job in its original paper so as to give the full picture, the job was eventually discarded. The complainants do not demur and their plea fails.

(d) The complainants say that the gulf between the best pay - 76,770 Swiss francs a year - and the worst - 46,878 - casts doubt on the choice of outside employers.

Though not denying the difference, the Commission sets it down to a policy of open-handedness in the best employer or to seniority or other factors.

The spread in pay does not suggest that the findings were wrong.

(e) The complainants point out that the worst employer would have been dropped according to the 1988 methodology but no longer is.

The Commission answers that by that methodology the worst employer might indeed have been struck out if consistently paying rates at least a tenth lower than the second worst one. But seldom did that happen; so the new rule - see 9 above - is that any extremes in pay should be referred to the Commission for a decision.

There was no mistake in the findings on that score.

(f) The complainants further question the findings on the grounds that for the job of documentation assistant those which had the lowest qualifications were earning the highest pay.

Since they concede, however, that the job was dropped from the list, no more need be said on that issue.

25. On rates of taxation applied to local pay the Commission took information from a firm of consultants known as AIRINC (Associates for International Research).

The complainants say that the Local Salary Survey Committee objected to not getting details of AIRINC's figures and, having had no answer, felt unable to check the ones in the data bank. They cite one example of the risk of error: a preparatory paper which gave tax figures omitted to dock earnings by 5 per cent against pension contributions, though the mistake was put right in the final document. Both papers show a deduction of 700 Swiss francs under professional expenses, whereas for the purposes of direct federal tax a Swiss tax guide puts the deductible amount under that head at 1,700 to 3,400 francs. The complainants contend that the risk of error makes the findings quite untrustworthy.

The Commission argues that it uses figures from AIRINC only if there are no others showing exactly what local tax liability is; it is up to the Local Committee to get the data and check them; and the secretariat asked it time and again to do so.

Yet in its further brief the Commission acknowledges the mistake in reckoning tax liability: in working out direct federal tax it deducted only 700 Swiss francs a year against professional expenses instead of 1,700.

Section 26 of the Swiss Federal Act on Direct Federal Tax reads:

> "Expenses related to employment are deductible as follows:
>
> (a) the necessary costs of travel between home and workplace;
>
> (b) the extra costs incurred by taking meals away from home and by performing teamwork;
>
> (c) any other costs entailed by the performance of work;
>
> (d) the costs of advanced training and of retraining for the work performed.
>
> The professional costs set out in (a) to (c) above are to be stated as fixed amounts; under (a) and (c) the taxpayer may offer evidence of higher costs."

The Federal Finance Department has issued an implementing order about the deduction, for the purpose of reckoning direct federal tax, of professional expenses incurred by anyone in gainful employment.

For the relevant tax year the fixed amount of deductible professional expenses ran to 3 per cent of net yearly earnings, albeit within a range from 1,700 to 3,400 Swiss francs. For any amount within those brackets the tax-payer did not have to offer evidence of expenses incurred but might do so for any expenses beyond 3,400 francs (see the Federal Law Digest 642.11 and 642.118.1 and, for the prevailing rate in 1995, the Official Digest of Federal Statutes, 1994, p. 1673).

The Commission submits that, even if it corrected the scales by taking the right tax figures, net pay for General Service staff would go up by only 0.08 per cent, or 5 Swiss francs a month, though it does not say how it worked that out.

The complainants postulate gross earnings of 100,000 Swiss francs a year and net earnings at that figure less 19,008; applying the rate of 3 per cent to the net figure, they come up with one of 2,429.76 francs for deductible expenses. Though unable to check the Commission's reckoning, they estimate that the mistake means a loss of 12.50 Swiss francs a month in pay.

The Commission was doubly wrong: it took the figure of 700 Swiss francs instead of 1,700 and it miscalculated the deduction, which is 3 per cent of net earnings subject to a minimum fixed amount of 1,700. But there is no need to allow for any bigger deduction against higher actual expenses shown by the tax-payer since the consequent tax cut is offset by the amount of such expenses.

Though there is no telling just what effect the mistake had, it was not trifling. The pay scales applicable as from October 1995 must be corrected even though, for the reasons explained in 4 above, the correction will not affect the amount of the complainants' pay in that month.

But the complainants cannot succeed in their contention that the mistake tainted the whole survey or the action that the Commission and the Union took on the findings.

26. The complainants see another mistake in the data about local dependency allowances. The spouse allowance fell – they observe – from 6,406 to 5,611 Swiss francs, while the child allowance rose from 3,411 or 3,299 – according to the date of recruitment – to 3,562 francs; the child allowance granted to a staff member with no spouse fell from 9,205 to 9,173 francs and the one for a secondary dependant from 1,452 or 1,254 – according to the date of recruitment – to 1,244 francs. In their submission those figures cast doubt on the accuracy of the data about allowances.

The Commission attributes the variations to the fact that in the last survey three employers were found to have been paying the spouse allowance whereas in the 1995 survey only one was. The last survey had also taken net earnings, whereas the figures of interim adjustments were based on gross earnings. The upshot is – says the Commission – too big an increase in the spouse allowance, though the reckoning was otherwise done by the same method in both surveys.

There is no reason to doubt the Commission's explanation.

27. The complainants discern flaws in the proceedings of the Commission's 42nd Session, which it held in New York from 24 July to 14 August 1995. They say that no text went out by the deadline set in its rules of procedure. The main preparatory paper, which was dated 2 August 1995, could not give the full picture since the last employer was not interviewed until 8 August. The papers were in only one language and some of them have not even yet come out in French. The draft report on the session is dated 13 August 1995 – a Sunday – whereas the last working paper was dated 10 August; so the Commission discussed on the 11th a paper it cannot have got before the 10th.

The Commission says that there were no flaws in the proceedings. As to the missed deadline and the missing translations, it points out that its rules of procedure are mere matters of form and its members implicitly waived compliance; and since the staff representatives chose not to take part there was no breach of staff rights.

For the reasons set out in 19 above the plea must fail.

28. The complainants claim the quashing of the impugned decisions on the grounds that they implemented a decision of the Commission's that seriously impaired their rights in three ways: the findings were conspicuously wrong; the Commission's approach was prejudiced; and it was bent on lowering General Service pay against the real trend in local pay in Geneva. There is, to their mind, no accounting otherwise for the fall of 7.4 per cent in the scales. According to the Swiss federal bureau of statistics pay rose in real terms by an average of 0.4 per cent a year from 1990 to 1994. Though not quite on a par with the Commission's, that figure does give a fair idea of the prevailing trend in Switzerland. Likewise the Commission's concurrent survey on the pay of language teachers in Geneva yielded a figure 1.3 per cent lower than at 1 January 1994, but the fall was due in part to taking most employers from the public sector, which was on a tight budget. The complainants argue that the trend in pay in cantonal government service ought to have had but little effect since according to the Commission's secretariat a drop of 7 per cent in such pay would mean one of only 0.25 per cent in the scales. The complainants say that Geneva is "just one of several headquarters duty stations to suffer a fall, with the striking exception of New York". Prejudiced as it was, the Commission spent much longer, they say, on the survey in Geneva than on the one in New York.

The Commission demurs, protesting that it went to great trouble over Geneva.

Despite the fall there is no affirming that its findings were wrong. Yet the complainants' general comment is true enough: the surveys at headquarters duty stations other than New York disclosed a dip in the best outside rates of pay: see 17 above. In Geneva the pay of language teachers fell by 1.3 per cent from January 1994 to June 1995. Besides, pay may vary appreciably by area and by job. Changes in the methodology, too, may account for some disparities and, the changes not being unlawful, neither are the consequences.

29. The complainants detect mistakes in bringing the new scales into force: they were applied in the United Nations before the Secretary-General was told of them, and the specialised agencies were not properly told either.

The complainants are not thereby challenging the lawfulness of the Commission's decision or the Union's duty to act on it as set out in 2 above.

There is no substance to the plea, and it therefore fails.

Pensions

30. Should the above pleas fail, the complainants offer two subsidiary arguments which they did not put forward in the internal proceedings. One is that there was a mistake of law in putting the figure of the retirement pension too low by the lights of a resolution of the General Assembly. The other is that there was a mistake of fact: in working out that figure on the strength of gross pay so as to let pensioners have a certain percentage of their employment earnings the Commission subtracted too little to cover the tax liability of pensioners, who are less likely than employees to get tax deductions. The complainants observe that the level of pensions affects that of contributions required of serving staff to finance them.

Precedent has it that the Tribunal will entertain new pleas if they fall within the ambit of the case as delimited by the claims made in the internal proceedings : see, for example, Judgment 1519 under 14. Since the reckoning of the pension turns in part on the salary scales in force as from 1 October 1995, the complainants may be deemed, in objecting to those scales, to be objecting to the reckoning of pensions too. That reckoning concerns the complainants insofar as it affects the level of their future pensions, whether the new scales mean a rise or a fall in contributions levied on pay.

On the Commission's recommendation the organisations of the common system explained to their General Service staff that the new scales reflected a decision the General Assembly had taken in 1993 to change the method of setting gross pensionable remuneration: contributions to the United Nations Joint Staff Pension Fund, to be levied on the figures of pay under the new scales, were to be geared to gross pensionable remuneration and not, as before, to gross salary.

(a) In their original brief the complainants point out that the levels of both pensions and pension contributions used to depend on gross salary, but henceforth the contributions are to be levied on only a segment of gross salary known as "gross pensionable remuneration". The segment was 66.25 per cent in 1993 and it corresponded to the maximum rate of pension accumulation for which at the time staff recruited on or after 1 January 1983 might qualify. The Assembly later increased that rate to 70 per cent as from 1 July 1995. The complainants contend that, "to be true to the spirit of the decision of 1993, the Commission should have taken the rate of 70 per cent in setting the scales". Not to do so was, they believe, wrong in law.

The Commission explains that the rate of conversion was set at 66.25 per cent in 1994 and also in that year the staff representatives proposed to the Commission and to the Joint Board of the Pension Fund putting the rate up to 70 per cent. The rate of conversion is not the same thing as the maximum rate of accumulation that applies to someone with the right seniority. Though there was much talk of the link between the rate of conversion and the average length of pensioners' membership of the Fund, neither Commission nor Board ever had it in mind that that rate should perforce change if the maximum rate of accumulation provided for in the Fund's Regulations did. For that purpose the Commission would have had to take the matter up with the Board and make a recommendation to the Assembly, and the Assembly, in its turn, would have had to approve the recommendation and amend Article 54 of the Fund's Regulations accordingly. In a resolution of 18 December 1996 the Assembly approved the Commission's decision to set the rate of conversion at 66.25 per cent. The complainants acknowledge that at the time there was no word of putting it up to 70 per cent, but say that the Commission was remiss not to recommend at once such an increase. To their mind there would have been no need to amend the Fund's Regulations.

There the complainants are merely advocating what the rules ought to say: there is no mistake of law.

(b) The complainants see a further mistake, and one of fact, in the rate of taxation that the Commission posited for the purpose of reckoning the net amount of local pensions in Geneva. It took the rate applicable to the earnings of an employee. Yet an employee may deduct professional expenses and social security contributions from taxable earnings whereas the pensioner may not and therefore bears a proportionately greater tax burden.

The Commission admits that it did take the lower rates of taxation applicable to local employees. Its debate on the issue revealed that the matter had not come up when the method of income replacement for the Professional and higher categories of staff had been determined. It held that it usually showed common sense in reckoning the tax burden of local employees so as to get pensionable remuneration just right. National law does not ordinarily link pensionable remuneration to net earnings but takes the gross figure instead. So the Commission's conclusion was that neither employees' earnings nor those of pensioners counted in setting pension contributions. The theory of it all – argues the Commission – is that at one stage it is the employees' earnings that count, at another the pensioners', and then the employees' again. So there was some consistency in reckoning the tax rates applicable to local employees' earnings in determining the rates of pension contribution applicable to General Service staff.

The complainants press their argument in their rejoinder. They cite an opinion expressed on the subject by the Standing Committee of the Joint Board of the Fund, which saw it as inconsistent to take the figure of pensioners' net income, yet make no deductions on account of their tax liability.

The complainants do not explain just what rule or principle they think the Commission has offended against. Of course pensionable remuneration does not depend on Flemming, nor are the complainants making out that it should. Nor, for that matter, are they relying on any binding promise about the level of pensionable remuneration. So they have failed to show any mistake of law in the method of determining it. The Commission knew that the method was moot, and the complainants are right to argue for special criteria for reckoning the tax liability of pensioners instead of the ones that apply to employees. But again they show no breach of their rights. Though the Commission cites the notion of income replacement that underlines the setting of pensions, the complainants have not even alleged, let alone shown, that the common system is bound by any strict rules for giving effect to the notion. Nor have they said how far a change in the method of reckoning local pensioners' tax burden would affect the amount of their own pension. The conclusion is that there was no abuse of the Commission's discretion in the method it followed and that the plea cannot be allowed.

DECISION

For the above reasons,

1. In accordance with what is said in 25 above the Union shall apply a new scale to the complainants' pay.
2. The Union shall pay each of the complainants 200 Swiss francs in costs.
3. Their other claims are dismissed.

In witness of this judgment, adopted on 18 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

A.B. GARDNER

Registry's translation,
the French text alone
being authoritative.

EIGHTY-SIXTH SESSION

***In re* Bernaz-Ciclet,**
Dondenne (Muriel), Driessens,
Neusser, Theunissen and Valvo

Judgment 1841

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mrs. Germaine Bernaz-Ciclet, Mrs. Muriel Dondenne, Mrs. Pascale Driessens, Mr. Antoni Neusser, Mrs. Marie-Paule Theunissen and Mrs. Jeannie Valvo against the World Intellectual Property Organization (WIPO) on 6 December 1996 and corrected on 8 September 1997, WIPO's single reply of 21 October, the complainants' letter of 5 December 1997 informing the Registrar that they did not wish to enter a rejoinder, the comments by the International Civil Service Commission (ICSC) of 22 January 1998, the complainant's comments thereon of 29 March, the Commission's further brief of 17 July on those comments, the Registrar's letter of 29 July, which the Organization did not answer, inviting WIPO to submit a surrejoinder, the complainants' further comments of 24 September and the Commission's comments thereon of 4 November 1998;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 6(1)(b), 9 and 13(3) of its Rules;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. What is known as the "Flemming" principle governs the pay of staff in the General Service category in organisations that belong to the common system of the United Nations. It calls for alignment with the best terms of employment at each duty station. Every five years the International Civil Service Commission carries out surveys to find out what the best terms are at headquarters duty stations. It has what it calls a "general methodology" for such surveys. As was explained in Judgments 1519 (*in re* Prados and others), 1641 (*in re* Berlioz No. 2 and others) and 1713 (*in re* Carretta and others) in A, the Commission revised its methodology in 1992.

In June to August 1995 it carried out a salary survey in Geneva according to the new methodology, the findings to afford the basis for new scales of pay for General Service category staff stationed there. At its 42nd Session (24 July-14 August 1995) it commended the new scales to the organisations with headquarters in Geneva. The upshot was that for General Service staff in Geneva the old scales would not be adjusted at 1 January 1995. The World Intellectual Property Organisation (WIPO) so decided, and in Judgment 1641 of 10 July 1997 the Tribunal ruled on complaints that challenged that decision.

By information circular 79 of 25 October 1995 the Director General of WIPO announced that new salary scales were to come into effect as from 1 October 1995 for staff in the General Service category. He explained that, though the new figures of pay were on the average 7.4 per cent lower than those in force in September 1995, they would apply only to staff recruited on or after 1 October. Besides giving, as before, gross and net pay, the scales showed gross pensionable remuneration.

The complainants are staff of WIPO in the General Service category and are stationed at headquarters in Geneva. By letters of 29 November 1995 they each asked the Director General to review his decision of 25 October as reflected in their pay slips for the month of October. He did not answer. On 20 February 1996 they therefore filed appeals with the Appeal Board of WIPO. In its report of 5 July 1996 the Board made two recommendations. It recommended, first, reviewing the complainants' pay from October 1995 to make sure that there were no grounds for objection to the salary scales; and, secondly, seeing whether it might be worth amending the Staff Rules to allow direct appeal to the Tribunal against a recommendation of the Commission's. On 9 September 1996 the Director General sent each of the complainants a memorandum saying that he was upholding the scales that had come in on 1 October 1995 and had taken "due note" of the Appeal Board's second recommendation. The complainants are challenging his decisions insofar as they reject the Appeal Board's first recommendation.

B. The complainants contend that the amendments that the Commission made to the methodology in 1992 were unlawful. Of some fifty amendments they see only one as in the staff's favour and nine as blatantly not. Surveys that the Commission has done by the amended methodology have meant a drop in staff pay at all headquarters duty stations but New York. In Geneva it came to 7.4 per cent. By rigging its methodology for that purpose the Commission offended against both Flemming and Regulation 4.1 of the WIPO Staff Regulations, which sets the criteria for recruitment. The complainants put the amendments down to the eagerness of some of the Commission's members to pander to a coterie of powerful nations by cutting costs to the staff's detriment, and at a time, to boot, when the Organization's budget was not even tight. Taken all together, the amendments undermine the whole purpose of the methodology.

The complainants' second plea is that arrangements for the 1995 survey were deeply flawed, and so was the conduct of it. It was sheer misuse of authority for the Commission to exploit the new "six-month rule" by making June 1995 the reference date for the survey and to refuse adjournment when it knew full well that the survey could not be properly done so soon. Flawed, too, were the proceedings at its 41st Session, which it held from 1 to 19 May 1995. For one thing, it missed the deadline in Rule 8 of its Rules of Procedure for letting members and observers have "documentation" relating to the survey. For another, that documentation had "serious shortcomings" that its secretariat never made a clean breast of. Again, under Rule 18 of the Rules of Procedure a French version ought to have gone out before the session, but none did. The Commission's Chairman showed bad faith: by a letter of 14 November 1994 he told the Under Secretary-General of the United Nations for Administration and Management that the matter of adjournment would be put to the Commission at its 41st Session; yet the last section of the preparatory document for the session said nothing of the kind. There were formal and procedural flaws in the contacts between the secretariat and the comparator employers.

As for the flaws in the conduct of the survey in Geneva, paragraph 15 of the methodology puts the "reasonable number" of comparator employers at "approximately twenty". Only 16 were sent questionnaires and of those two or four failed to meet the criteria. Paragraph 22 states that "the typical number of jobs to be surveyed should be between 14 and 20" and paragraph 40 that, when there are "approximately 20 employers", "at least one quarter of the surveyed employers should provide data for a particular job in order to retain it for the analysis". Had that criterion been met, 10 of the 22 jobs picked would have been dropped; but the Commission preferred to keep them so as to have the minimum required. The complainants go in detail into the sample jobs. They find much wrong with the data. They point out that the Local Salary Survey Committee said in a report dated 2 August 1995 that despite insistent demands the ICSC's secretariat had failed to let it know just how AIRINC (Associates for International Research), a firm of consultants, had worked out the tax deductions relevant for Geneva. That is why the Committee felt unable to check the figures. Yet the secretariat was not shy of firm figures in its main report on the survey: allowable deductions from Swiss federal tax for professional expenses came, it said, to 700 Swiss francs. The right figure is 3 per cent of net earnings, within a range from 1,700 francs to 3,400.

There were breaches of the rules at the Commission's 42nd Session, too, many of them the same as at its 41st.

The complainants' third line of argument is that the findings of the survey were obviously wrong. According to the Swiss federal bureau of statistics average pay in Switzerland went up in real terms by an average of 0.4 per cent a year from 1990 to 1994. Though that figure does not allow of direct comparison with the findings of the survey, the Commission's own reckoning gave a fall of 7.4 per cent. The gap between the two figures is big enough to suggest that the findings about outside pay in Geneva shot wide of the mark. Bent as it was on bringing down General Service pay in Geneva, the Commission was guilty of preconceived opinion and misuse of authority.

Fourthly, the complainants plead that the new pay scales were put into force before the Secretary-General of the United Nations had even been told of them and that, in breach of the procedure laid down in Article 25 of the Commission's Statute, neither the Director General of WIPO nor, for that matter, the staff representatives were told of them either. In subsidiary argument they contend that the scale of gross pensionable remuneration shows a mistake of law as to the "conversion rate" and one of fact as to the tax rates applied.

They ask the Tribunal to quash the decisions in their pay slips for October 1995 and award them the arrears of pay due and interest thereon at the rate of 8 per cent a year. They claim 3,000 Swiss francs each in costs.

C. In its reply WIPO refers to the brief it put to its own Appeal Board. It submits that when staff are challenging a decision of the Director General's on the grounds that it gives effect to some decision of the Commission's that is of questionable lawfulness it is up to the Commission and not to the Director General to account for its decision.

D. The Commission submits that its revision of the methodology in 1992 was quite lawful. Since some of the amendments were more sweeping than others, it will not do for the complainants just to tot up the ones they see as unfavourable against the others. The objections they have to some of them are misconceived. The purpose was not at all to cut pay but to keep more faithfully to Flemming.

As to the arrangements for the survey in Geneva in 1995, the core of the work was the gathering of data. It was, according to the schedule put through at the 36th Session, to be done in the second quarter of 1995. Though it had to be held over until June 1995, that was because the staff representatives had baulked at what the revised methodology required of them. There was nothing wrong with what the Commission did at its 41st Session: it may waive provisions of its own rules of procedure for the sake of its members' convenience. Nor were there any formal or procedural flaws in the contacts between its secretariat and the chosen employers.

The only snag the Commission ran into over carrying out the survey was finding enough outside employers to meet the criteria. What made things harder was that the staff representatives were trying to get the employers to withhold the data needed. The Commission rebuts the complainants' other pleas and answers point by point their objections to the sample of jobs and the soundness of the data. It is ordinarily up to the Local Salary Survey Committee to find out about tax rates and allowable deductions for Geneva and, if it cannot, it is up to the Commission to get the information from AIRINC instead. The secretariat asked the Committee time and again to say whether its figures were right.

The Commission denies breaking any rule of procedure at its 42nd Session.

It had come to no foregone conclusions about the outcome of the survey. Its people put in quite enough time in Geneva in 1995 and went to trouble to get the work done well.

By a letter of 18 August 1995 its Chairman told the Secretary-General of the United Nations of the new scales, and copies of the letter went on 15 September to the executive heads of the specialised agencies with headquarters in Geneva.

There was no mistake of law about the "conversion rate" in the scales of gross pensionable remuneration.

E. The complainants challenge the Commission's explanations and enlarge on their own pleas. They observe that the Commission does not deny its mistake over the tax figures and accuse it of shifting blame to the Local Committee. They press their claims.

F. In a further brief the Commission maintains that the complainants have found not a single new argument to back up their case. It did "let through a mistake in the tax figures" and the deductions from tax for professional expenses should have been 1,700 Swiss francs and not 700. But even if those mistakes had been put right average net pay in Geneva would have gone up by a mere 0.08 per cent a month, or five Swiss francs.

G. In further comments admitted by the President of the Tribunal the complainants submit that the Commission's avowal comes late in the day. It is still wrong to give only the figure of 1,700 Swiss francs: the right one is – they repeat – 3 per cent of net earnings, and not less than 1,700 Swiss francs or more than 3,400. The mistake means a loss in pay of some

12.50 francs a month. It affects, too, the reckoning of allowances for a spouse or dependent child and of pensionable remuneration. And it was not the only mistake.

H. In final comment the Commission maintains that the mistake made no immediate impact on the complainants' earnings. The survey gave warrant that the old scales of pay for staff in the General Service category at the time of the survey were 7.42 per cent too high. If the Commission had taken 1,700 Swiss francs as the minimum figure of allowable tax deductions the new scales would have been 7.34 per cent lower than the old ones, and even if, as the complainants suggest, it had taken the figure of 3 per cent of net income, a minimum of 1,700 francs and a maximum of 3,400, the new scales would still have been 7.28 per cent lower. So on any hypothesis there was no avoiding a fall in pay. When a survey shows pay to be too high the common system is wont, not to lower it, but to freeze it. So the defendant refrained from applying the new scales to staff like the complainants whom it had taken on before the scales went into force. Only for staff recruited after the new scales came in did the mistake have any effect on pay, and it was trifling at that.

CONSIDERATIONS

1. The complainants belong to the General Service category of staff of the World Intellectual Property Organization (WIPO), which belongs to the common system of the United Nations. They are employed at headquarters in Geneva. They are challenging the Organization's decisions on their pay as from the month of October 1995. WIPO approved the pay scales on the recommendation of the International Civil Service Commission (ICSC). In keeping with what is known as the "Flemming" principle the Commission drew up the scales in the light of trends in the pay of the best-paid workers at the duty station. In accordance with a revised general methodology which it had adopted in 1992 it had had a survey of pay carried out in Geneva from June to August 1995, 1 June of that year being the "reference date".

The complainants' case is that the scales recommended by the Commission were unlawful and WIPO should not have adopted them. In their view some of the amendments which the Commission had made in its methodology – and which are taken up in detail in 5 to 17 below – were in breach of the Flemming principle. They say that those amendments brought about a drop in pay that offended against what the Tribunal had said in Judgment 986 (*in re* Ayoub No. 2 and others): there was breach of their acquired rights, of their contracts of service, of good faith and of their rightful expectations about the level of pay. They see a further breach of their rights in the carrying out of the survey in that it broke rules of form and substance. On the strength of comparison of pay between Geneva and New York the scales betray preconceived thinking and abuse of authority. Lastly, the complainants put two more pleas to the Tribunal: one is that the scales were not conveyed in final form to the Secretary-General of the United Nations before coming into force; and the other is that in drawing up the scales of gross pensionable remuneration the Commission made a mistake of law by taking 66.25 per cent as the "rate of accumulation" and one of fact over the relevant rate of taxation.

The Commission rebuts all the pleas put forward by the complainants.

2. Many judgments have explained how the common system revises pay and what power of review the Tribunal has. Examples are Judgments 1000 (*in re* Clements and others), 1265 (*in re* Berlioz and others), 1266 (*in re* Cussac and others), 1457 (*in re* Di Palma and others), 1458 (*in re* Damond and others), 1459 (*in re* Hoebreck and others), 1460 (*in re* Derqué and others), 1498 (*in re* Schiffmann and others), 1499 (*in re* Berger and others), 1519 (*in re* Prados and others), 1641 (*in re* Berlioz No. 2 and others), 1642 (*in re* Huber and Treso), 1713 (*in re* Carretta and others), 1765 (*in re* Dondenne No. 2 and others), 1766 (*in re* Heitz No. 4), 1776 (*in re* Damond No. 3 and others), 1777 (*in re* Heitz No. 5), not to mention all the other precedents cited therein.

A staff member who challenges an individual decision that affects him may challenge the general one that it implements, even if the source of the general one was not the employer organisation itself but an outside body such as the Commission. So before acting on any decision or recommendation of the Commission's the organisation must be satisfied that it is lawful.

The choice of method for following a principle like Flemming is largely a technical issue and a matter of discretion. The Tribunal will therefore exercise only a limited power of review.

3. According to precedent it is the implementing decisions that may be challenged and here they are the ones that set the complainants' pay from October 1995. The general decision to approve the pay scales is not directly challengeable, though the complainants may indirectly challenge it insofar as it affords the basis for the impugned decisions.

4. To be receivable a complaint must disclose some cause of action.

In its final comments the Commission pleads that the complainants fail to show any cause of action: the new scales based on the findings of the survey caused them no loss of pay. That, it points out, is because they had the earlier figures of their pay "frozen". It explains:

> "When someone on a 'frozen' scale gets a step, ordinarily once a year, or else promotion, pay is on that scale, not on the ones based on the survey, and stays on it until the new ones overtake it by dint of adjustment to the cost-of-living index. When they do, it is they that set pay. But they have not done so yet and are unlikely to before the next survey for Geneva, scheduled for 2001."

The Commission is mistaken. The complainants do have a cause of action and may now challenge the new scales because on them will depend the duration of the "freeze" in their pay and the reckoning of any rise they may become entitled to. Pay scales must ordinarily be challenged forthwith. As the Tribunal has said before, if administrative decisions are to hold good and relations between organisation and staff to be stable, no appeal may lie against them at the time of later revision: see, for example, Judgments 1664 (*in re* Cook No. 7 and Rosé No. 2), 1682 (*in re* Argos and others), 1780 (*in re* Kunstein-Hackbarth) and the other precedents there given. If someone on a frozen pay scale might wait to challenge the new scales, that would make for great uncertainty.

The amendments made in 1992 to the methodology

5. The Commission submits that Judgments 1641 and 1642 rejected by implication the complainants' objections to the revision of its methodology.

They did not: they said under 4 that the amendments had not been challenged in the complaints. Besides, they were about another issue altogether – the setting of pay as from January 1995 – and so do not carry the authority of *res judicata*.

6. The Commission first revised its methodology in 1988. Its report for 1992 to the General Assembly of the United Nations gave an account of the second revision, done in that year. In resolution 47/216 of 23 December 1992 the Assembly took note of that second batch of amendments. In 1994 it asked the Commission to go ahead with the surveys under way at headquarters duty stations and to follow the revised methodology for the purpose. Actually some of the fifty-odd amendments were not innovations.

The complainants contend that, though some of the amendments – known in the Commission's parlance as "decisions" – had no effect on pay, one of them that did favour the staff was not applied at all to the Geneva survey in 1995 and nine were downright unfavourable. The complainants take up ten of the "decisions": in their submission all are challengeable because they betray Flemming and, taken together, serve to lower pay.

7. Decision (v) by the Commission was –

> "To amend the condition in the current methodology as regards the inclusion of public service or parastatal institutions in the sample of employers, as follows:
>
> 'Surveyed employers should represent a reasonable cross-section of competitive economic sectors, as well as the public service or parastatal institutions with no sector unduly dominating the sample.'"

The 1988 version of the methodology had said on that subject:

> "The employers should represent a reasonable cross-section of competitive economic sectors, including the public service or parastatal institutions, with no one sector unduly dominating the sample."

The complainants object to decision (v) on the grounds that it is to the staff's detriment to require "the inclusion ... of public service institutions, which are not ordinarily among the best-paying employers at any duty station".

The Commission says that there is nothing new about including the public service. The 1988 methodology did, and for years pay in the public service has been seen as a worthwhile standard of comparison. Including it is – says the Commission – quite in tune with Flemming and, according to paragraph 41 of its report on the 1992 methodology, discarding an employer is merely provisional anyway because the Commission itself has the last word in each instance.

As was said in 2 above, a staff member may challenge a general decision in impugning an individual one but must show that the general decision afforded the basis for it. Here the complainants do not allege, let alone show, that the above amendment to the methodology harmed their interests or, to be more particular, that the previous survey discounted pay in the public service or, for that matter, that the pay of public servants in Geneva falls below the best rates to be found there. So it is immaterial whether the complainants are objecting only to the amendment or to counting public servants' pay, even if it already counted before the amendment.

Besides – subject to what statistics might reveal – the Tribunal sees no breach of Flemming in counting it: the national public service is much like the international civil service as to the sort of work done, the structure and size of units, and the manner of payment. On the evidence the Commission was guilty of no abuse of discretion on that score.

8. Decision (vi) says:

> "That the minimum number of clerical and support employees per employer should be set at 100. Where transitional measures are required to maintain reasonable continuity of employers between surveys, the requirement concerning the revised minimum number of employees would be applicable only to employers not previously surveyed; in any case, employers with less than 50 employees would be excluded."

In the complainants' submission the purpose was to harm the staff's interests. In Geneva – they argue – where the employment market is small, there were keenly competitive employers with twenty or thirty employees, and the Geneva survey broke the rule so as to make the findings "look convincing".

The Commission explains that its purpose in raising the minimum number of employees was to bring it nearer to that of international staff at headquarters duty stations. It quotes from paragraph 14 of its report on the 1992 methodology:

> "Where transitional measures are required to maintain reasonable continuity of employers between surveys, the requirement concerning the revised minimum number of employees would be applicable only to employers not previously surveyed."

Comparison of the surveys done in Geneva in 1990 and 1995 shows that the increase had little or no effect.

The complainants acknowledge as much in their rejoinder. So the impugned decisions are not flawed on that score.

9. Decision (xxvi) was -

> "To delete the current rule in the methodology, whereby an employer would be excluded if the base salary plus other elements of remuneration for the lowest-ranking employer resulted in average salaries 10 per cent or more below the next higher average salary for each job."

In the complainants' view it was in breach of Flemming and the staff's rights to do away with the possibility of striking out an employer who was obviously not one of the best.

The Commission points out that according to the 1988 methodology an employer might be dropped if for all jobs pay was at least one tenth lower than the figures on offer from the other employers. Actually few employers ever were dropped: an employer might be offering the worst pay for some jobs but not commonly for all. So the survey switched to taking minimum and maximum figures from a schedule of pay rates for different sorts of job.

The complainants discern in the Commission's new approach a wish to harm their interests, the findings being unreliable if not all the highest figures of pay are taken. Besides, as Judgment 1713 made clear about a survey in Rome, the Commission is not actually taking the minimum and maximum figures that its new method is supposed to call for.

That judgment explained in 8 that the complainants in that case were objecting to the methodology on the grounds that the Commission had taken average figures of pay of categories of employees in Rome instead of the minimum and maximum ones it had been taking until then. The old approach would give a more objective yardstick because in Rome few employers had, like the United Nations, any system of grading posts. The Commission had demurred on the grounds that average figures did give a reliable picture. The Tribunal's ruling was that the Commission's purpose had not been to harm the staff's interests and that there was nothing blatantly wrong with the exercise of its discretion.

That ruling holds good here. The complainants have not shown that the survey was done in Geneva in the same way as in Rome. Besides, if the challenged method was not applied in Geneva there is no substance to the plea. In any event the conclusion is, again, that there was no obvious abuse of the Commission's discretion in the change.

10. The gist of decision (xxxiii), which is about "evaluating" fringe benefits, is that what counts is the cost to the employer, not the value to the employee.

That amendment aroused opposition when applied to a survey in Paris. Judgment 1519 said in 6 that, as the complainants had argued in that case, it did mean "a reduction of outside employees' fringe benefits"; but the change was "not as bad as they make out since some such benefits were already being evaluated in terms of cost to the employer"; "the effect of the change was slight"; and there was "nothing inherently wrong" with the Commission's exercising its discretion to count the cost of all fringe benefits to employers.

The complainants cite that judgment in support of their view that, being to their detriment, the amendment was unlawful.

The Tribunal sees no reason to depart from what it said before.

11. Decision (xl) does away with the "language factor". That was an adjustment that took account of language skills and used to be granted in Rome and in Vienna, where the working languages of the organisations do not include the one commonly spoken by local people.

Since the amendment had no effect on the findings about pay in Geneva, the complainants are mistaken in relying on Judgment 1713.

12. Decision (xlii) is to the effect -

> "That, in view of the use of the job classification system and dual pay-line methodology, no adjustments in respect of internal/external differences in length of service/seniority should be made to internal salary levels."

The upshot is that for the sake of comparison with outside pay there is no longer any need to make corrections to take account of differences in employees' seniority, which become irrelevant.

The complainants again object on the grounds that the amendment is to their detriment. They say that in organisations which have a freeze on recruitment seniority is tending to rise whereas among outside employers it is not. The consequence is, they explain, that United Nations staff are earning more than outside employees in like jobs and their pay looks misleadingly high. To stop making adjustments on that account is unfair, though it would not be if international organisations took on many young people. In the complainants' submission Judgment 1519 condemned the change.

The Commission's answer is that, though seniority was one of the main criteria for granting step increments to General Service staff, most of the comparator employers made performance, and not seniority, the test.

Judgment 1519 took up under 17 a similar plea about the survey in Paris. It said that, though there was merit in the criticism - comparison of jobs at like levels of seniority being preferable – the comparison was fated to go awry, to whichever side one might tend on the point. The conclusion was that the approach that the survey had taken was not unlawful and had not gone beyond the bounds of the Commission's discretion.

That ruling holds good.

13. Decision (xliii) is –

> "To include salary data for staff in receipt of the extra longevity step approved by the Commission in 1984, at the next lower step."

The complainants object on the grounds that the amendment "makes for even more tendentious findings".

The Commission submits that it is a more workmanlike approach to take figures of pay of staff in the common system without regard to the "extra" step: though of course everyone counts for the sake of comparison, those who get the extra step will be deemed to be at the one just below.

The complainants' retort is that the approach would be "workmanlike" only if the survey took for the sake of comparison outside employees in like case. It does not.

Here the complainants are objecting not to the methodology as such but to the way in which it was applied. There can be no breach of Flemming in any method that is supposed to show things up as they really are, and, besides, what was said in 12 above again holds good. The plea fails.

14. Decision (xliv) reads:

> "To include salary data for staff at steps beyond those approved by the Commission, at their actual step."

The complainants contend that it flouts what Judgments 1265 and 1266 said under 36. To their mind it is unfair to count benefits improperly granted to staff in some organisations and so inflate the pay of staff in organisations like WIPO that do abide by the rules of the common system.

The Commission points out that those two judgments came after the 1990 survey in Geneva and that "in the Geneva survey in 1995 staff whose step was beyond the one approved by the Commission were put at steps set in keeping with Judgments 1265 and 1266".

The complainants maintain that decision (xliv) ignored what the Tribunal had said; the method was not, they say, corrected even in the revision of July 1997, and adapting the methodology is no way of complying with Judgments 1265 and 1266.

Those judgments acknowledged in 36 that, if one organisation of the common system granted staff within-grade steps beyond those approved by the Commission for the purpose of Flemming, the extra ones should not count in setting pay in the international civil service at large. So the judgments set aside the impugned decisions and ordered the defendant to set pay by a reckoning that discounted the extra steps for the sake of comparison.

At issue here is whether the Commission observed precedent in carrying out the survey in Geneva in 1995. Judgments 1265 and 1266 went out on 14 July 1993; so, as the Commission observes, the methodology which the complainants are indirectly challenging - and which goes back to 1992 - is earlier and decision (xliv) cannot be seen as wilful defiance of precedent. Besides, the complainants have not objected to the Commission's statement that the conduct of the survey was in line with Judgments 1265 and 1266 and there is therefore no reason to question it. The complainants argue that the Commission ought to have gone back on decision (xliv) in 1997, when it again revised the methodology; but their point is immaterial if the decision was not actually applied in this case. Since it was not, it caused them no injury and their plea does not hold water.

15. By decision (xlvii) the Commission resolved -

> "To establish a uniform factor of 0.9 by which the index movement should be governed for purposes of periodic adjustments between surveys ..."

The complainants object to that decision; the Commission explains it. But it too is immaterial: the decisions impugned were the outcome of a survey and "adjustments between surveys" are simply not at issue. The plea again fails.

16. The last of the Commission's "decisions" that the complainants challenge is (xlviii): it does away with "interim adjustments" of pay in the six months "prior to the reference date of a survey", and they see it as detrimental.

Judgments 1641 and 1642 held that that decision was not at odds with Flemming and the complainants therefore waive the plea. Again, there is no reason to depart from what those judgments said.

17. The complainants point out that the surveys done according to the 1992 methodology brought about a big fall in pay. The fall was 7.4 per cent for Geneva, 7.3 for Montreal, 5.4 for Paris, 5.3 for London, 3.2 for Vienna and 2.6 for Rome, as against a rise of 1.13 per cent for New York. The complainants see such falls as a departure from Flemming. The gist of the argument is that they were largely due to the Commission's tampering with the methodology so as to bring down pay in the international civil service against the trend of local pay.

That line of argument is implausible, to say the least. Wages may of course strengthen, but when the economy goes into a downswing they may slacken too. At all events the complainants have failed to show that staff pay fell for the reasons they make out. Although some of the amendments to the methodology may be moot, there are no grounds for treating them as the main cause of the falls in General Service pay or attributing them to wilful contrivance.

There is therefore no substance to the plea that the complainants rest on Judgment 986 (*in re* Ayoub No. 2 and others).

The 1995 survey

18. The complainants say that Commission and Organization alike were guilty of misuse and abuse of authority by making 1 June 1995 the reference date for the survey. It would, they argue, have been right to hold

over the survey so as to let General Service staff gain earlier from the so-called "six-month rule" and so also from the findings.

That rule took effect before the new scales came in; the complainants are challenging their pay for October 1995; and the rule is therefore not directly relevant. Besides, Judgments 1641 and 1642 declared that it had not been unlawful six months before 1 June 1995 to make that the reference date for the survey.

Once the date had been set it would doubtless have been hard to hold it over for the purpose of applying the six-month rule. It was also in line with Flemming not to take too long over the survey.

The complainants see misuse and abuse of authority in the Commission's turning down the staff representatives' request for adjournment of the survey and of the entry into force of the new scales: it just did not have time for a proper survey. In support of that plea they cite some of their arguments about the complaints that Judgments 1641 and 1642 ruled on.

In rebuttal the Commission points out that the General Assembly wanted the survey done soon; the staff representatives would not take part, although the rules said they should, and put a spoke in the wheel by trying to get employers not to answer; and it ill befits the complainants to carp at the consequences of the representatives' stance.

Articles 6(1)(b) and 9 of the Tribunal's Rules require the complainants to state their pleas in their original brief and rejoinder. They may not just cite arguments about some other case: such pleading is not admissible and the Tribunal will not entertain it.

Judgment 1519 said in 18 that it was important to have staff representatives take part in general surveys. If they will not do so they may disrupt the work and the proper exchange of information. Here again they chose not to help.

The detailed evidence the Commission adduces on the merits is cogent. The Organization – and only the Organization's decisions are at issue – did not act unlawfully in declining on the grounds that the complainants suggest to turn down the Commission's recommendations.

19. The complainants see flaws in the proceedings of the Commission's 41st Session, which it held in Montreal from 1 to 19 May 1995.

(a) They plead breach of Rule 8 of its Rules of Procedure, which says that papers must go to members and observers no later than four weeks before the start of a regular session. They plead breach of Rule 18 too, which says that all papers about agenda items must go out in the working languages, English and French. They point out that the preparatory papers were dated 12 and 13 April 1995 and an appendix to document ICSC/41/R.12/Part I, which was a letter from the presidents of the Geneva staff unions and associations to the executive heads of the organisations in Geneva, was only in French, so that members who read only English could not fathom it.

The Commission says that, though indeed not strictly complied with, the two rules are for its members' own convenience, the members waived the time limit and the need for translation, no-one minded and the waiver was valid. Since the rules did not go to the essence of the procedure – the argument runs – it was up to anyone who alleged breach of them to demand compliance; the representatives of the staff of organisations in Geneva did not, and so there was no procedural flaw.

The Commission's reply is in line with general rules of procedure and is quite sound.

(b) Under the heading "Concealment" the complainants argue that the Chairman of the Commission did not let its members have enough information. On 30 September 1994 the organisations asked how the survey could go ahead without the recalcitrant staff representatives. Though the Chairman answered on 14 November 1994, the paper intended for the Commission was not ready until 12 April 1995, nineteen days before the start of its session. According to the complainants, a letter of 10 April from the secretariat said that it had not yet gone into the proposals for the survey, whereas the paper dated 13 April showed that it had. The complainants argue that that paper hid the fact that the Chairman needed more information before he exercised the authority delegated to him to approve the choice of employers, jobs, job descriptions and questionnaires. So the Commission did not work properly and the Chairman withheld information that its members needed to make up their minds.

The Commission protests that the charges are offensive to its Chairman.

Though the staff representatives' abstention did hamper the preparations for the survey and the conduct of it, that is no reason to doubt its lawfulness or impute improper behaviour to the Commission's secretariat or membership. And though things went swiftly, it is not shown that the Chairman or the secretariat failed to give the members enough information.

(c) The complainants further tax the Chairman with bad faith on the grounds that in a letter he promised to put the matter of adjournment to the Commission whereas in a later document that proposed action of various sorts to the Commission itself he said nothing on the subject.

No such inconsistency is proved. For one thing, the Chairman's saying that the proposal for adjournment would go to the Commission did not mean that he would back it or put it to the members in writing. For another thing, the document did not preclude his taking the matter up at the 41st Session.

(d) The complainants object to the Commission's going ahead on the grounds that the decision was hasty, stubborn and unwise.

But there was no denying the need for the survey and on the evidence the decision to go ahead was not improper. The plea fails.

20. The complainants blame the Commission for a mistake of procedure in the contacts it had with the chosen employers. They say that as early as 10 April 1995, even before the start of its 41st Session, its secretariat wrote to the international organisations in Geneva to tell them to make appointments with the employers in the period from 1 to 23 June 1995.

The Commission answers that its secretariat did so by way of precaution to gain time. Had there been no survey after all, it would of course have cancelled the appointments.

The explanation is plausible, indeed beyond reproach: there was no mistake of procedure.

21. The complainants contend that the survey itself showed many flaws, one being the choice of employers.

(a) They point out that the methodology puts the "reasonable number" of employers at "approximately twenty", whereas only sixteen were picked for the survey.

They are mistaken. The words "approximately twenty" and "reasonable number" show that the methodology gives no firm figure but just a rough idea; so the decision to take sixteen passes muster.

At all events - say the complainants - the number of employers should have been twelve to fourteen, because with some the interviews were improper for the reasons set out in (b), (c) and (d) below.

(b) One interview was by telephone: that shows how casual the survey was and, in accordance with Judgment 1000, warrants "setting aside" the findings.

The Commission explains that an interview by telephone, though quite unusual, is allowable when the employer has been consulted in an earlier survey and the Commission already has reliable information from it on the matching of jobs and on levels of pay. Members of the survey team may draw on information obtained by telephone if they so wish.

Judgment 1000 says nothing on that score, and what the Commission says rules out abuse of discretion.

(c) The complainants point out that two of the employers had no system of grading posts, though the methodology says that that is desirable.

The Commission explains that, especially in Europe, not every employer has a system of grading like the one used in the common system. The criteria are that the setting of pay should not be haphazard and that distinctions in category and pay should depend on responsibility and on the work done; and it is up to the survey team to say whether an employer meets those criteria.

The Commission did not thereby abuse its discretion.

(d) The complainants observe that one employer had only 23 employees whereas the methodology requires at least 50.

The Commission explains that that employer had already been "used" in earlier surveys; there had to be some continuity in the choice of employers; and representatives of staff and management had often asked the Commission not to apply the rule too strictly but bear in mind the smallness of the employment market in Geneva. The Commission took its decision after careful thought.

In challenging decision (vi) the complainants have objected to the minimum of 50 employees on the grounds that it scarcely applies in Geneva: see 8 above. So it is odd that they should object to taking one employer that had fewer than 50. At all events it was in line with the methodology to take such transitional action. Again there was no abuse of the Commission's discretion.

(e) The complainants see "imbalance" in the choice of sectors of employment in the survey, there being a drop in the number of banks, which are among the best employers.

The Commission says that although there had been four banks in the last survey two of them had merged and so there were only three in 1995. Out of sixteen employers there were three banks, and that number is more than enough.

There again the complainants have failed to show any breach of discretion.

(f) The complainants accuse the Commission of perverting the methodology so as to get the survey to cover particular employers or jobs. The Commission answers that it does not follow the methodology too rigidly but fits it to local conditions and so, in Geneva, to the smallness of the employment market.

That approach complies with the methodology as revised in 1992, in particular with paragraphs 6 and 13, and with the broad, merely indicative guidelines that the methodology offers for carrying out surveys. So there was nothing unlawful about it.

22. The complainants object to the choice of jobs. Paragraph 22 of the methodology says that there must be a sample of fourteen to twenty jobs. Only by artifice did the Commission push the number up to fourteen: some of them did not fully qualify.

The Commission explains how it came to pick those jobs. Because some enterprises were small it was unreasonable to expect them to employ many people in the same sort of job. The Commission took care to see that jobs matched and it discarded any for which it felt that not enough employers were offering a true match.

Again there is no evidence to suggest any abuse of authority by the Commission.

23. The complainants object to the sample of jobs.

(a) One of the jobs the Commission took was senior secretary, and the final table shows 158 of them with fourteen employers. In the complainants' submission cantonal government was overwhelmingly preponderant in employing such secretaries, and presumably computer information assistants too: there were 44 such assistants with three employers and one with each of another four.

The Commission says that it wanted to keep the job of senior secretary because it was typical, even though some employers had only one. As for the alleged predominance of cantonal government, the methodology is not strict about the number of people there should be on the same sort of job with any one employer. In any event the impact of employers with a large staff is, it argues, levelled out by logarithmic weighting.

There is no evidence of any mistake or breach of discretion on that score.

(b) The number of accounting clerks fell inexplicably from 44 to 43 for the same number of employers.

The Commission acknowledges a mistake in the paper by its secretariat but points to the correction in its report.

Obviously the mistake does not matter.

(c) The jobs of transport assistant and senior cashier were – say the complainants – kept, even though there were no such jobs in outside employment in Geneva.

The Commission demurs: those jobs were dropped in the final findings for want of enough employers offering matches.

There being no reason to question that explanation, the plea fails.

(d) The complainants go with a fine-tooth comb through the data provided by one employer, a bank, on 8 August 1995, i.e. after the issuance of the preparatory paper of 2 August. They say that comparison of that paper with the final table shows that whereas the number of employers went up from seven to eight the number of messengers rose from 35 to 43; the bank had neither a junior nor a category I nor a category II secretary, but ten senior ones; it had five category I and as many category III accounting clerks but not a single senior finance assistant; it had five telephone operators, no security guard, five electronic-data-processing assistants, no computer information assistant and no senior cashier.

The Commission maintains that the data are reliable. Though for some jobs there are no matches, the jobs still exist: the duties simply fail to match the description. What with computers and redundancies everywhere more and more employers have been merging duties and responsibilities. Security in the bank is provided, not by its own employees, but by an outside firm.

Although the Commission's general comments call for no ruling, the Tribunal cannot go into detail and tell whether a proper match was found for each job taken. When in doubt on technical issues, however, it will endorse the Commission's assessment: here too the complainants have failed to show any abuse of discretion.

24. The complainants question the soundness of the data.

(a) They point out that the "benchmark" jobs in cantonal government were at lower levels than in the last survey and the corresponding figures of pay were thus brought 7 per cent lower. The Commission's secretariat estimated the effect at a reduction of 0.25 per cent in the total of outside pay.

The Commission says that because of the prominence of cantonal government matching jobs were chosen carefully and approved by two members of the survey team. It argues that, though the figures of pay for some of the matching jobs may have been lower in 1995 than in 1990, the reason is that the earlier survey discounted employees with under five years' seniority. In 1995 there was no new information about seniority, the criteria for matches being the work to be done, the required qualifications and the level of responsibility.

The complainants show no mistake of fact in the findings. The Tribunal took up in 12 above the plea about the amendment to the methodology and found decision (x1ii) beyond reproach. And the manner of applying it is not faulty either.

(b) The complainants point out that for five employers the number of staff ends in a nought and infer that the Commission rounded the figures up or down. To their mind that is evidence of shoddy work and suggests that the findings are unreliable.

The Commission denies outright having tampered with the figures; it took the ones the employers gave, though some of them may of course have rounded staff numbers up or down.

No mistake is proved on that score.

(c) The complainants say that one employer offered a job with a single employee and for that reason the job ought to have been scrapped.

The Commission answers that, though the secretariat mentioned that job in its original paper so as to give the full picture, the job was eventually discarded. The complainants do not demur and their plea fails.

(d) The complainants say that the gulf between the best pay - 76,770 Swiss francs a year - and the worst - 46,878 - casts doubt on the choice of outside employers.

Though not denying the difference, the Commission sets it down to a policy of open-handedness in the best employer or to seniority or other factors.

The spread in pay does not suggest that the findings were wrong.

(e) The complainants point out that the worst employer would have been dropped according to the 1988 methodology but no longer is.

The Commission answers that by that methodology the worst employer might indeed have been struck out if consistently paying rates at least a tenth lower than the second worst one. But seldom did that happen; so the new rule - see 9 above - is that any extremes in pay should be referred to the Commission for a decision.

There was no mistake in the findings on that score.

(f) The complainants further question the findings on the grounds that for the job of documentation assistant those which had the lowest qualifications were earning the highest pay.

Since they concede, however, that the job was dropped from the list, no more need be said on that issue.

25. On rates of taxation applied to local pay the Commission took information from a firm of consultants known as AIRINC (Associates for International Research).

The complainants say that the Local Salary Survey Committee objected to not getting details of AIRINC's figures and, having had no answer, felt unable to check the ones in the data bank. They cite one example of the risk of error: a preparatory paper which gave tax figures omitted to dock earnings by 5 per cent against pension contributions, though the mistake was put right in the final document. Both papers show a deduction of 700 Swiss francs under professional expenses, whereas for the purposes of direct federal tax a Swiss tax guide puts the deductible amount under that head at 1,700 to 3,400 francs. The complainants contend that the risk of error makes the findings quite untrustworthy.

The Commission argues that it uses figures from AIRINC only if there are no others showing exactly what local tax liability is; it is up to the Local Committee to get the data and check them; and the secretariat asked it time and again to do so.

Yet in its further brief the Commission acknowledges the mistake in reckoning tax liability: in working out direct federal tax it deducted only 700 Swiss francs a year against professional expenses instead of 1,700.

Section 26 of the Swiss Federal Act on Direct Federal Tax reads:

> "Expenses related to employment are deductible as follows:
>
> (a) the necessary costs of travel between home and workplace;
>
> (b) the extra costs incurred by taking meals away from home and by performing teamwork;
>
> (c) any other costs entailed by the performance of work;
>
> (d) the costs of advanced training and of retraining for the work performed.
>
> The professional costs set out in (a) to (c) above are to be stated as fixed amounts; under (a) and (c) the taxpayer may offer evidence of higher costs."

The Federal Finance Department has issued an implementing order about the deduction, for the purpose of reckoning direct federal tax, of professional expenses incurred by anyone in gainful employment.

For the relevant tax year the fixed amount of deductible professional expenses ran to 3 per cent of net yearly earnings, albeit within a range from 1,700 to 3,400 Swiss francs. For any amount within those brackets the tax-payer did not have to offer evidence of expenses incurred but might do so for any expenses beyond 3,400 francs (see the Federal Law Digest 642.11 and 642.118.1 and, for the prevailing rate in 1995, the Official Digest of Federal Statutes, 1994, p. 1673).

The Commission submits that, even if it corrected the scales by taking the right tax figures, net pay for General Service staff would go up by only 0.08 per cent, or 5 Swiss francs a month, though it does not say how it worked that out.

The complainants postulate gross earnings of 100,000 Swiss francs a year and net earnings at that figure less 19,008; applying the rate of 3 per cent to the net figure, they come up with one of 2,429.76 francs for deductible expenses. Though unable to check the Commission's reckoning, they estimate that the mistake means a loss of 12.50 Swiss francs a month in pay.

The Commission was doubly wrong: it took the figure of 700 Swiss francs instead of 1,700 and it miscalculated the deduction, which is 3 per cent of net earnings subject to a minimum fixed amount of 1,700. But there is no need to allow for any bigger deduction against higher actual expenses shown by the tax-payer since the consequent tax cut is offset by the amount of such expenses.

Though there is no telling just what effect the mistake had, it was not trifling. The pay scales applicable as from October 1995 must be corrected even though, for the reasons explained in 4 above, the correction will not affect the amount of the complainants' pay in that month.

But the complainants cannot succeed in their contention that the mistake tainted the whole survey or the action that the Commission and the Organization took on the findings.

26. The complainants see another mistake in the data about local dependency allowances. The spouse allowance fell - they observe - from 6,406 to 5,611 Swiss francs, while the child allowance rose from 3,411 or 3,299 - according to the date of recruitment - to 3,562 francs; the child allowance granted to a staff member with no spouse fell from 9,205 to 9,173 francs and the one for a secondary dependant from 1,452 or 1,254 - according to the date of recruitment - to 1,244 francs. In their submission those figures cast doubt on the accuracy of the data about allowances.

The Commission attributes the variations to the fact that in the last survey three employers were found to have been paying the spouse allowance whereas in the 1995 survey only one was. The last survey had also taken net earnings, whereas the figures of interim adjustments were based on gross earnings. The upshot is - says the Commission - too big an increase in the spouse allowance, though the reckoning was otherwise done by the same method in both surveys.

There is no reason to doubt the Commission's explanation.

27. The complainants discern flaws in the proceedings of the Commission's 42nd Session, which it held in New York from 24 July to 14 August 1995. They say that no text went out by the deadline set in its rules of procedure. The main preparatory paper, which was dated 2 August 1995, could not give the full picture since the last employer was not interviewed until 8 August. The papers were in only one language and some of them have not even yet come out in French. The draft report on the session is dated 13 August 1995 - a Sunday - whereas the last working paper was dated 10 August; so the Commission discussed on the 11th a paper it cannot have got before the 10th.

The Commission says that there were no flaws in the proceedings. As to the missed deadline and the missing translations, it points out that its rules of procedure are mere matters of form and its members implicitly waived compliance; and since the staff representatives chose not to take part there was no breach of staff rights.

For the reasons set out in 19 above the plea must fail.

28. The complainants claim the quashing of the impugned decisions on the grounds that they implemented a decision of the Commission's that seriously impaired their rights in three ways: the findings were conspicuously wrong; the Commission's approach was prejudiced; and it was bent on lowering General Service pay against the real trend in local pay in Geneva. There is, to their mind, no accounting otherwise for the fall of 7.4 per cent in the scales. According to the Swiss federal bureau of statistics pay rose in real terms by an average of 0.4 per cent a year from 1990 to 1994. Though not quite on a par with the Commission's, that figure does give a fair idea of the prevailing trend in Switzerland. Likewise the Commission's concurrent survey on the pay of language teachers in Geneva yielded a figure 1.3 per cent lower than at 1 January 1994, but the fall was due in part to taking most employers from the public sector, which was on a tight budget. The complainants argue that the trend in pay in cantonal government service ought to have had but little effect since according to the Commission's secretariat a drop of 7 per cent in such pay would mean one of only 0.25 per cent in the scales. The complainants say that Geneva is "just one of several headquarters duty stations to suffer a fall, with the striking exception of New York". Prejudiced as it was, the Commission spent much longer, they say, on the survey in Geneva than on the one in New York.

The Commission demurs, protesting that it went to great trouble over Geneva.

Despite the fall there is no affirming that its findings were wrong. Yet the complainants' general comment is true enough: the surveys at headquarters duty stations other than New York disclosed a dip in the best outside rates of pay: see 17 above. In Geneva the pay of language teachers fell by 1.3 per cent from January 1994 to June 1995. Besides, pay may vary appreciably by area and by job. Changes in the methodology, too, may account for some disparities and, the changes not being unlawful, neither are the consequences.

29. The complainants detect mistakes in bringing the new scales into force: they were applied in the United Nations before the Secretary-General was told of them, and the specialised agencies were not properly told either.

The complainants are not thereby challenging the lawfulness of the Commission's decision or the Organization's duty to act on it as set out in 2 above.

There is no substance to the plea, and it therefore fails.

Pensions

30. Should the above pleas fail, the complainants offer two subsidiary arguments which they did not put forward in the internal proceedings. One is that there was a mistake of law in putting the figure of the retirement pension too low by the lights of a resolution of the General Assembly. The other is that there was a mistake of fact: in working out that figure on the strength of gross pay so as to let pensioners have a certain percentage of their employment earnings the Commission subtracted too little to cover the tax liability of pensioners, who are less likely than employees to get tax deductions. The complainants observe that the level of pensions affects that of contributions required of serving staff to finance them.

Precedent has it that the Tribunal will entertain new pleas if they fall within the ambit of the case as delimited by the claims made in the internal proceedings : see, for example, Judgment 1519 under 14. Since the reckoning of the pension turns in part on the salary scales in force as from 1 October 1995, the complainants may be deemed, in objecting to those scales, to be objecting to the reckoning of pensions too. That reckoning concerns the complainants insofar as it affects the level of their future pensions, whether the new scales mean a rise or a fall in contributions levied on pay.

On the Commission's recommendation the organisations of the common system explained to their General Service staff that the new scales reflected a decision the General Assembly had taken in 1993 to change the method of setting gross pensionable remuneration: contributions to the United Nations Joint Staff Pension Fund, to be levied on the figures of pay under the new scales, were to be geared to gross pensionable remuneration and not, as before, to gross salary.

(a) In their original brief the complainants point out that the levels of both pensions and pension contributions used to depend on gross salary, but henceforth the contributions are to be levied on only a segment of gross salary known as "gross pensionable remuneration". The segment was 66.25 per cent in 1993 and it corresponded to the maximum rate of pension accumulation for which at the time staff recruited on or after 1 January 1983 might qualify. The Assembly later increased that rate to 70 per cent as from 1 July 1995. The complainants contend that, "to be true to the spirit of the decision of 1993, the Commission should have taken the rate of 70 per cent in setting the scales". Not to do so was, they believe, wrong in law.

The Commission explains that the rate of conversion was set at 66.25 per cent in 1994 and also in that year the staff representatives proposed to the Commission and to the Joint Board of the Pension Fund putting the rate up to 70 per cent. The rate of conversion is not the same thing as the maximum rate of accumulation that applies to someone with the right seniority. Though there was much talk of the link between the rate of conversion and the average length of pensioners' membership of the Fund, neither Commission nor Board ever had it in mind that that rate should perforce change if the maximum rate of accumulation provided for in the Fund's Regulations did. For that purpose the Commission would have had to take the matter up with the Board and make a recommendation to the Assembly, and the Assembly, in its turn, would have had to approve the recommendation and amend Article 54 of the Fund's Regulations accordingly. In a resolution of 18 December 1996 the Assembly approved the Commission's decision to set the rate of conversion at 66.25 per cent. The complainants acknowledge that at the time there was no word of putting it up to 70 per cent, but say that the Commission was remiss not to recommend at once such an increase. To their mind there would have been no need to amend the Fund's Regulations.

There the complainants are merely advocating what the rules ought to say: there is no mistake of law.

(b) The complainants see a further mistake, and one of fact, in the rate of taxation that the Commission posited for the purpose of reckoning the net amount of local pensions in Geneva. It took the rate applicable to the earnings of an employee. Yet an employee may deduct professional expenses and social security contributions from taxable earnings whereas the pensioner may not and therefore bears a proportionately greater tax burden.

The Commission admits that it did take the lower rates of taxation applicable to local employees. Its debate on the issue revealed that the matter had not come up when the method of income replacement for the Professional and higher categories of staff had been determined. It held that it usually showed common sense in reckoning the tax burden of local employees so as to get pensionable remuneration just right. National law does not ordinarily link pensionable remuneration to net earnings but takes the gross figure instead. So the Commission's conclusion was that neither employees' earnings nor those of pensioners counted in setting pension contributions. The theory of it all – argues the Commission – is that at one stage it is the employees' earnings that count, at another the pensioners', and then the employees' again. So there was some consistency in reckoning the tax rates applicable to local employees' earnings in determining the rates of pension contribution applicable to General Service staff.

The complainants cite an opinion expressed on the subject by the Standing Committee of the Joint Board of the Fund, which saw it as inconsistent to take the figure of pensioners' net income, yet make no deductions on account of their tax liability.

The complainants do not explain just what rule or principle they think the Commission has offended against. Of course pensionable remuneration does not depend on Flemming, nor are the complainants making out that it should. Nor, for that matter, are they relying on any binding promise about the level of pensionable remuneration. So they have failed to show any mistake of law in the method of determining it. The Commission knew that the method was moot, and the complainants are right to argue for special criteria for reckoning the tax liability of pensioners instead of the ones that apply to employees. But again they show no breach of their rights. Though the Commission cites the notion of income replacement that underlines the setting of pensions, the complainants have not even alleged, let alone shown, that the common system is bound by any strict rules for giving effect to the notion. Nor have they said how far a change in the method of reckoning local pensioners' tax burden would affect the amount of their own pension. The conclusion is that there was no abuse of the Commission's discretion in the method it followed and that the plea cannot be allowed.

DECISION

For the above reasons,

1. In accordance with what is said in 25 above WIPO shall apply a new scale to the complainants' pay.
2. The Organization shall pay each of the complainants 200 Swiss francs in costs.
3. Their other claims are dismissed.

In witness of this judgment, adopted on 18 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

A.B. GARDNER

Registry's translation,
the French text alone
being authoritative.

EIGHTY-SIXTH SESSION

***In re* Besse-Harrison** **Judgment 1842**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Ariane Besse-Harrison against the International Union for the Protection of New Varieties of Plants (UPOV) of 6 December 1996 and corrected on 8 September 1997, the UPOV's reply of 21 October, the complainant's letter of 5 December 1997 informing the Registrar of the Tribunal that she did not wish to enter a rejoinder, the comments by the International Civil Service Commission (ICSC) of 22 January 1998, the complainant's comments thereon of 29 March, the Commission's further brief of 17 July on those comments, the Registrar's letter of 29 July, which the Union did not answer, inviting it to submit a surrejoinder, the complainant's brief of 24 September and the Commission's final brief of 4 November 1998;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 6(1)(b), 9 and 13(3) of its Rules;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case, the pleadings and the complainant's claims are the same as those summed up under A to H in Judgment 1841 (*in re* Bernaz-Ciclet and others), also delivered this day;

CONSIDERATIONS

1. This case raises the same issues as the complaints filed by Mr. Joël Desbiolles and others on 13 September 1996 against the International

Telecommunication Union (ITU) and by Mrs. Germaine Bernaz-Ciclet and others on 6 December 1996 against the World Intellectual Property Organization (WIPO). Only the defendant – UPOV – is not the same, though it too has its headquarters in Geneva. Mrs. Besse-Harrison belongs to the General Service category of UPOV's staff, and the relevant provisions are the Staff Regulations and Staff Rules of WIPO as applied to the staff of UPOV.

2. In Judgments 1840 and 1841 the Tribunal allows in part the complaints of Mr. Desbiolles and others and of Mrs. Bernaz-Ciclet and others. For the same reasons it allows this complaint too in part.

DECISION

For the above reasons,

1. In accordance with what is said under 25 in Judgment 1841 (*in re* Bernaz-Ciclet and others), delivered this day, the Union shall apply a new scale to the complainant's pay.
2. The Union shall pay the complainant 200 Swiss francs in costs.
3. Her other claims are dismissed.

In witness of this judgment, adopted on 18 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-SIXTH SESSION

In re **Isaacs**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Evelyn W. Isaacs against the World Health Organization (WHO) on 26 March 1998 and corrected on 15 May;

Considering that by a letter of 23 July 1998 counsel informed the Registrar of the Tribunal that the complainant wished to withdraw suit;

Considering that by a letter of 31 July 1998 the Organization informed the Registrar that it had no objection to the withdrawal of suit;

Considering that suit is unreservedly withdrawn:

DECISION

The withdrawal of suit is hereby recorded.

In witness of this judgment, adopted on 18 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Jean-Francois Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

MICHEL GENTOT

JEAN-FRANÇOIS EGLI

SEYDOU BA

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-SIXTH SESSION

***In re* Natarajan**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Krishnan Natarajan against the International Labour Organization (ILO) on 27 March 1998 and the Organization's reply of 1 July;

Considering that by a fax letter of 18 August 1998 the complainant informed the Registrar of the Tribunal that he wished to withdraw suit;

Considering that by a letter of 24 August 1998 the Organization informed the Registrar that it had no objection to the withdrawal of suit;

Considering that suit is unreservedly withdrawn;

DECISION

The withdrawal of suit is hereby recorded.

In witness of this judgment, adopted on 18 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Jean-Francois Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

MICHEL GENTOT

JEAN-FRANÇOIS EGLI

SEYDOU BA

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-SIXTH SESSION

In re **Plugge (No. 2)**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Hubert Boudewyn Plugge against the European Patent Organisation (EPO) on 5 December 1997 and the EPO's reply of 23 February 1998;

Considering that by a letter of 3 May 1998 the complainant informed the Registrar of the Tribunal that he wished to withdraw suit;

Considering that by a letter of 25 May 1998 the Organisation informed the Registrar that it had no objection to the withdrawal of suit;

Considering that suit is unreservedly withdrawn:

DECISION

The withdrawal of suit is hereby recorded.

In witness of this judgment, adopted on 18 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Jean-Francois Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

MICHEL GENTOT

JEAN-FRANÇOIS EGLI

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INTERNATIONAL LABOUR ORGANISATION
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